In the Supreme Court of the United States,

October Term, 1898.

No. 334.

WATERS-PIERCE OIL COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICTS OF THE STATE OF TEXAS.

(No. 16,919.)

STATEMENT OF CASE.

The statement of case made by plaintiffs in error is not full enough, hence the following is made:

This suit was brought in the district court of Travis county, Texas, on the 5th day of February, 1896. The case was a complaint by the State, acting through its Attorney-General, of the Waters-Pierce Oil Company, E. T. Hathaway, Wm. F. Grice, F. A. Austin, J. W. Keenan, and Lewis Fries, hereinafter styled defendants, alleging in substance:

"1. That the State of Texas, acting by and through its Attorney-General, is the plaintiff.

"2. That the Waters-Pierce Oil Company, E. T. Hathaway, William Grice, F. A. Austin, J. W. Keenan and Lewis Fries are defendants.

"3. That the Waters-Pierce Oil Company is a private corporation duly and legally incorporated under the laws of the State of Missouri, and that its principal offices are situated in the city of St.

Louis, in the State of Missouri, with the following officers: Henry Clay Pierce, president; Arthur M. Finlay, vice-president; N. M. Adams, treasurer; J. P. Gruet, secretary, and E. Willis, Auditor; that, as shown by its articles of incorporation, the objects for which said company was formed are dealing in naval stores and dealing in and compounding petroleum and other oils and all the products thereof, and buying and selling the same in the State of Missouri and other States; that the capital stock of said corporation was originally the sum of one hundred thousand dollars, but that the amount of same was, in accordance with the laws of said State of Missouri, on, to-wit, the 20th day of June, 1882, increased to the sum of four hundred thousand dollars.

"4. That on, to-wit, July 6th, 1889, said Waters-Pierce Oil Company filed in the Secretary of State's office of this State, in accordance with the requirements of law, a certified copy of its articles of incorporation, and secured a permit to transact business, as stated in its said articles of incorporation, in this State for the term of ten years from said date.

"5. That since said date said corporation has been, under and by virtue of said permit, transacting business in this State; that for the purpose of transacting said business, it has, in pursuance of its policy and purposes, hereinafter to be stated, and in pursuance of the policy, objects and purposes of the unlawful combinations and trusts hereinafter to be named and described, subdivided the State of Texas into five grand divisions, in which to sell the oils of the Waters-Pierce Oil Company and carry out its purposes and the purposes and objects of the unlawful combinations and trusts hereinafter mentioned, and has appointed an agent for each grand division, and has also appointed many local agents for the various towns, cities and counties in this State; that the defendant E. T. Hathaway, a resident of the city of Denison, Grayson county, Texas, is and has been for many years the general manager of said Waters-Pierce Oil Company for the North Texas division; that the defendant F. A. Austin, a resident of the city of Marshall, Harrison county, Texas, is the manager of Waters-Pierce Oil Company for the East Texas division; that the defendant Wm. Grice, a resident of the city of Dallas, Dallas county, Texas, is the manager of the Waters-Pierce Oil Company for the Central Texas division; that the defendant J. W. Keenan, a resident of Galveston, Galveston

county, Texas, is the acting manager of said company for the Southern Texas division; that the defendant Lewis Fries, a resident of the city of San Antonio, Bexar county, Texas, is the manager of said company for the Western Texas division; that one W. B. Abadie, a resident of Travis county, Texas, is the local agent for said company at the city of Austin, Travis county, Texas.

"6. That heretofore, to-wit, on or about the 2nd day of January, 1882, and again on or about the 4th day of said month, a great many firms, partnerships, individuals and corporations, the said firms, partnerships, individuals and corporations being stated in the instruments of writing hereinafter set out, and owning and controlling a large amount of the money and capital invested in the production of petroleum and its products and in the production, manufacture and sale and shipment of said products, and the means and instrumentalities employed in such industries, met at some place in the United States, to your petitioner unknown, and made, entered into and executed the following unlawful agreements, combinations and trusts, to-wit:

"'This agreement made and entered into upon this second day of January, 1882, by and between all the persons who shall now or may hereafter execute the same as parties thereto, witnesseth:

"'I. It is intended that the parties to this agreement shall embrace three classes, to-wit:

"'1st. All the stockholders and members of the following corporations and limited partnerships, to-wit:

"'Acme Oil Company (New York); Acme Oil Company (Pennsylvania); Atlantic Refining Company of Philadelphia; Bush & Co., Limited; Camden Consolidated Oil Co.; Elizabethport Acid Works; Imperial Refining Co., Limited; Chas. Pratt & Co.; Payne, Ablett & Co., Limited; Standard Oil Company (Ohio); Standard Oil Company (Pittsburg); Smith's Ferry Oil Trans. Company; Solar Oil Company, Limited; Sone & Fleming Manufacturing Company, Limited.

"'Also, all stockholders and members of other corporations and limited partnerships as may hereafter join in this agreement at the request of the trustees herein provided for.

"'2nd. The following individuals, to-wit:

"'W. C. Andrews, Jno. D. Archbold, Lide K. Arter, J. A. Bostick, Benj. Brewster, D. Bushnell, Thos. C. Bushnell, J. N. Camden, Henry L. Davis, H. M. Flagler, Mrs. H. M. Flagler, H. M. Harma, and Geo. W. Chapin, D. M. Harkness, trustee, S. V. Harkness, John Huntington, H. A. Hutchins, Chas. F. G. Heye, O. B. Jennings, Chas. Lockhart, A. M. McGregor, Wm. H. Macy, William H. Macy, Jr., estate of Josiah Macy, Jr., Wm. H. Macy, Jr., executor, O. H. Payne, O. H. Payne, trustee, Chas. Pratt, Horace A. Pratt, C. M. Pratt, A. J. Pouch, John D. Rockefeller, Wm. Rockefeller, Henry H. Rogers, W. P. Thompson, J. J. Vandegrift, William T. Wardwell, W. G. Warden, Jos. L. Warden, Frew & Co., Louis C. Wheaton, Julia H. York, Geo. H. Vilas, M. R. Keath, Geo. F. Chester, trustee.

"'Also, all such individuals as may hereafter join in this agreement at the request of the trustees herein provided for.

"'3rd. A portion of the stockholders and members of the following corporations and limited partnerships, to-wit:

" 'American Lubricating Oil Company, Baltimore United Oil Company, Beacon Oil Co., Bush & Denslow Manufacturing Co., Central Refining Co., of Pittsburg, Cheesbrough Manufacturing Company, Chess-Carley Co., Consolidated Tank Line Co., Inland Oil Co., Keystone Refining Co., Maverick Oil Co., National Transit Co., Portland Kerosene Oil Co., Producer's Consolidated Land and Petroleum Co., Signal Oil Works, Limited, Thompson & Bedford Co., Limited, Devoe Manufacturing Co., Eclipse Lubricating Oil Co., Limited, Empire Refining Co., Limited, Franklin Pipe Co., Limited, Galena Oil Works, Limited, Galena Farm Oil Co., Limited, Germania Mining Co., Vacuum Oil Co., H. C. Tan Vine & Co., Limited, Waters-Pierce Oil Company.

" 'Also stockholders and members (not being all thereof) of other corporations and limited partnerships who may hereafter join in this agreement at the request of the trustees herein provided for.

" 'II. The parties hereto do covenant and agree to and with each other, each in consideration of the mutual covenants and agreements of the others, as follows:

" '(1) As soon as practicable, a corporation shall be formed in each of the following States, under the laws thereof, to-wit: Ohio, New York, Pennsylvania and New Jersey; provided, however, that instead of organizing a new corporation, any existing charter and organization may be used for the purpose when it can advantageously be done.

" '(2) The purposes and powers of said corporation shall be to mine for, produce, manufacture, refine and deal in petroleum and all its products, and all the materials used in such business, and transact other business collateral thereto. But other purposes and powers shall be embraced in the several charters, such as shall seem expedient to the parties procuring the charter, or, if necessary to comply with the law, the powers aforesaid may be restricted and reduced.

" '(3) At any time hereafter, when it may seem advisable to the trustees herein provided for, similar corporations may be formed in other States and Territories.

" '(4) Each of said corporations shall be known as the Standard Oil Company of ———— (and here shall follow the name of the State or Territory by virtue of the laws of which said corporation is organized).

" '(5) The capital stock of each of said corporations shall be fixed at such an amount as may seem necessary and advisable to the parties organizing the same in view of the purpose to be accomplished.

" '(6) The shares of stock of said corporations shall be issued only for money, property or assets equal at a fair valuation to the par value of the stock delivered therefor.

" '(7) All of the property, real and personal, assets and business of each and all of the corporations and limited partnerships mentioned or embraced in class first shall be transferred to and vested in the several Standard Oil Companies. All of the property, assets and business in, or of each particular State shall be transferred to and vested in the Standard Oil Company of that particular State, and in order to accomplish such purpose, the directors and managers of each and all of the several corporations and limited partnerships mentioned in class first, are hereby authorized and directed by the stockholders and members thereof (all of them being parties to this agreement), to sell, assign, transfer, convey and make over, for the consideration hereinafter mentioned, to the Standard Oil Company or Companies of the proper State or States, as soon as said corporations are organized and ready to receive the same, all the property, real and personal, assets and business of said corporations and limited partnerships. Correct schedules of said property, assets and business shall accompany each transfer.

" '(8) The individuals embraced in class second of this agreement do each for himself agree, for the consideration hereinafter mentioned, to sell, assign, transfer, convey and set over all of the property, real and personal, assets and

business mentioned and embraced in schedules accompanying such sale and transfer to the Standard Oil Company or Companies, of the proper State or States, as soon as the said corporations are organized and ready to receive the same.

"'(9) The parties embraced in class third of this agreement do covenant and agree to assign and transfer all of the stock held by them in the corporations or limited partnerships herein named, to the trustees herein provided for, for the consideration and upon the terms hereinafter set forth. It is understood and agreed that the said trustees and their successors may hereafter take the assignments of stocks in the same or similar companies upon the terms herein provided, and that whenever or as often as all the stocks of any corporation or limited partnership are vested in said trustees, the proper steps may then be taken to have all the money, property, real and personal, of such corporation or partnership assigned and conveyed to the Standard Oil Company of the proper State, on the terms and in the mode herein set forth, in which event the trustees shall receive stocks of the Standard Oil Companies equal to the values of the money, property and business assigned to be held in place of the stocks of the company or companies assigning such property.

"'(10) The consideration for the transfer and conveyance of the money, property and business aforesaid to each or any of the Standard Oil Companies shall be stock of the respective Standard Oil Company to which said transfer or conveyance is made, equal at par value to the appraised value of the money, property and business so transferred. Said stock shall be delivered to the trustees hereinafter provided for, and their successors, and no stock of any of said companies shall ever be issued, except for money, property or business, equal at least to the par value of the stock so issued, nor shall any stock be issued by any of said companies for any purpose, except to the trustees herein provided for, to be held subject to the trusts hereinafter specified. It is understood, however, that this provision is not intended to restrict the purchase, sale and exchange of property by said Standard Oil Companies as fully as they may be authorized to do by their respective charters, provided only that no stock be issued therefor except to said trustees.

"'(11) The consideration for any stocks delivered to said trustees, as above provided for as well as for stocks delivered to said trustees by persons mentioned or included in class third of this agreement, shall be the delivery by said trustees to the persons entitled thereto, of trust certificates hereinafter provided for, equal at par value to the par value of the stocks of the said Standard Oil Company so received by said trustees and equal to the appraised value of the stocks of other companies or partnerships delivered to said trustees. (The said appraised value shall be determined in a manner agreed upon by the parties in interest and the said trustees.) It is understood and agreed, however, that the said trustees may, with any trust funds in their hands, in addition to the mode above provided, purchase the bonds and stocks of other companies engaged in business similar or collateral to the business of said Standard Oil Companies, on such terms and in such mode as they may deem advisable, and shall hold the same for the benefit of the owners of said trust certificates, and may sell, assign, transfer and pledge such bonds and stocks whenever they may deem it advantageous to said trust so to do.

"'III. The trusts upon which said stock shall be held, and the number, powers, and duties of said trustees shall be as follows:

"'(1) The number of trusts shall be nine.

"'(2) J. D. Rockefeller, O. H. Payne and Wm. Rockefeller are hereby appointed trustees, to hold their office until the first Wednesday of April, A. D. 1885.

"'(3) J. A. Bostick, H. M. Flagler and W. G. Warden are hereby appointed trustees to hold their office until the first Wednesday of April, A. D. 1884.

"'(4) Chas. Pratt, Benj. Brewster and Jno. D. Archbold are hereby ap-

pointed trustees, to hold their office until the first Wednesday of April, A. D. 1883.

" '(5) Elections for trustees to succeed those herein appointed shall be held annually, at which election a sufficient number of trustees shall be elected to fill all vacancies occurring either from the expiration of the term of the office of trustees, or from any other cause. All trustees shall be elected to hold their office for three years, except those elected to fill a vacancy arising from any cause, except expiration of term, who shall be elected for the balance of the term of the trustee whose place they are elected to fill. Every trustee shall hold his office until his successor is elected.

" '(6) Trustees shall be elected by ballot by the owners of trust certificates or their proxies. At all meetings the owners of trust certificates, who may be registered as such on the books of the trustee, may vote in person or by proxy, and shall have one vote for each and every share of trust certificates standing in their names, but no such owner shall be entitled to vote upon any share which has not stood in his name thirty days prior to the day appointed for the election. The transfer books may be closed for thirty days immediately preceding the annual election. A majority of the shares represented at such election shall elect.

" '(7) The annual meeting of the owners of such trust certificates for the election of trustees, and for other business, shall be held at the office of the trustees, in the City of New York on the first Wednesday of April of each year, unless the place of meeting be changed by the trustees, and said meeting may be adjourned from day to day until its business is completed. Special meetings of the owners of said trust certificates may be called by the majority of the trustees at such times and places as they may appoint. It shall also be the duty of the trustees to call a special meeting of holders of trust certificates whenever requested to do so by a petition signed by the holders of ten per cent. in value of such certificates. The business of such special meetings shall be confined to the object specified in the notice given therefor. Notice of the time and place of all meetings of the owners of trust certificates shall be given, by personal notice as far as possible, and by public notice in one of the principal newspapers of each State, in which a Standard Oil Company exists, at least ten days before such meeting. At any meeting a majority in value of the holders of trust certificates represented consenting thereto, by-laws may be made, amended and repealed, relative to the mode of election of trustees and other business of the holders of trust certificates, provided, however, that said by-laws shall be in conformity with this agreement. By-laws may also be made, amended and repealed at any meeting by and with the consent of a majority in value of the holders of trust certificates, which alter this agreement relative to the number, powers and duties of the trustees, and to other matters tending to the more efficient accomplishment of the objects for which the trust is created, provided only that the essential intents and purposes of this agreement be not thereby changed.

" '(8) Whenever a vacancy occurs in the board of trustees more than sixty days prior to the annual meeting for the election of trustees it shall be the duty of the remaining trustees to call a meeting of the owners of the Standard Oil trust certificates for the purpose of electing a trustee or trustees to fill the vacancy or vacancies. If any vacancy occurs in the board of trustees from any cause, within sixty days of the date of the annual meeting for the election of trustees, the vacancy may be filled by a majority of the remaining trustees, or at their option, may remain vacant until the annual election.

" '(9) If, for any reason, at any time a trustee or trustees shall be appointed by any court to fill any vacancy or vacancies in said board of trustees, the trustee or trustees so appointed shall hold his or their respective office or offices only until a successor or successors shall be elected in the manner above provided for.

" '(10) Whenever any change shall occur in the board of trustees, the legal

title to the stock and other property held in trust shall pass to and vest in the successors of said trustees without any formal transfer thereof. But if at any time such formal transfer shall be deemed necessary or advisable it shall be the duty of the board of trustees to obtain the same, and it shall be the duty of any retiring trustee or the administrator or executor of any deceased trustee to make said transfer.

" '(11) The trustees shall prepare certificates which shall allow the interest of each beneficiary in said trust, and deliver them to the persons properly entitled thereto. They shall be divided into shares of the par value of one hundred dollars each, and shall be known as Standard Oil trust certificates, hundred dollars each and shall be known as Standard Oil trust certificates, and shall be issued subject to all the terms and conditions of this agreement. The trustees shall have power to agree upon and direct the form and contents of said certificates, and the mode in which they shall be signed, attested and transferred. The certificates shall contain an express stipulation that the holders thereof shall be bound by the terms of this agreement and by the by-laws herein provided for.

" '(12) No certificates shall be issued except for stocks and bonds held in trust, as herein provided for and the par value of certificates issued by said trustees shall be equal to the par value of the stocks of said Standard Oil Companies, and the appraised value of other bonds and stocks held in trust. The various bonds, stocks and moneys held under said trust shall be held for all parties in interest jointly, and the trust certificates so issued shall be the evidence of the interest held by the several parties in this trust. No duplicate certificates shall be issued by the trustees, except upon surrender of the original certificate or certificates for cancellation, or upon satisfactory proof of the loss thereof, and in the latter case they shall require a sufficient bond of indemnity.

" '(13) The stocks of the various Standard Oil Companies held in trust by said trustees, shall not be sold, assigned or transferred by said trustees, or by the beneficiaries, or by both combined, so long as this trust endures. The stocks and bonds of other corporations, held by said trustees, may be by them exchanged or sold and the proceeds thereof distributed pro rata to the holders of trust certificates, or said proceeds may be held and reinvested by said trustees for the purposes and uses of the trust; provided, however, that said trustees may, from time to time, assign such shares of stock of said Standard Oil Companies as may be necessary to qualify any person or persons chosen or to be chosen as directors and officers of any of said Standard Oil Companies.

" '(14) It shall be the duty of said trustees to receive and safely keep all interest and dividends declared and paid upon any of the said bonds, stocks and moneys held by them in trust and to distribute all moneys received from such sources or from sales of trust property or otherwise by declaring and paying dividends upon the Standard trust certificates as funds accumulate, which, in their judgment, are not needed for the uses and expenses of said trust. The trustees shall, however, keep separate accounts of receipts from interest and dividends, and of receipts from sales or transfers of trust property, and in making any distribution of trust funds, in which moneys derived from sales or transfers shall be included, shall render the holders of trust certificates a statement showing what amount of the fund distributed has been derived from such sales or transfers. The said trustee may also be authorized and empowered by a vote of the majority in value of holders of trust certificates, whenever stocks or bonds have accumulated in their hands from money purchases thereof, or the stock or bonds held by them have increased in value, or stock dividends shall have been declared by any of the companies whose stocks are held by said trustees or whenever from any such cause it is deemed advisable to so do, to increase the amount of trust certificates to the extent of such increase or accumulation of values, and to divide the same among the persons then owning trust certificates pro rata.

" '(15) It shall be the duty of said trustees to exercise general supervision over the affairs of said several Standard Oil Companies, and as far as practicable over the other companies or partnerships, any portion of whose stock is held in trust. It shall be their duty as stockholders of said companies to elect as directors and officers thereof faithful and competent men. They may elect themselves to such positions when they see fit so to do, and shall endeavor to have the affairs of said companies managed and directed in the manner they may deem most conducive to the best interest of the holders of said trust certificates.

" '(16) All the powers of the trustees may be exercised by a majority of their number. They may appoint from their own number an executive and other committees. A majority of each committee shall exercise all the powers which the trustees may confer upon such committee.

" '(17) The trustees may employ and pay all such agents and attorneys as they deem necessary in the management of said trust.

" '(18) Each trustee shall be entitled to a salary for his services not exceeding twenty-five thousand dollars per annum, except the president of the board, who may be voted a salary not exceeding thirty thousand dollars per annum, which salaries shall be fixed by said board of trustees. All salaries and expenses connected with or growing out of the trust shall be paid by the trustees from the trust fund.

" '(19) The board of trustees shall have its principal office in the City of New York, unless changed by vote of the trustees, at which office, or at some place of safe deposit in said city, the bonds and stocks shall be kept. The trustees shall have power to adopt rules and regulations pertaining to the meetings of the board, the election of officers and the management of the trust.

" '(20) The trustees shall render at each annual meeting a statement of the affairs of the trust. If a termination of the trust be agreed upon as hereinafter provided, or within a reasonable time prior to its termination by lapse of time, the trustees shall furnish to the holders of the trust certificates a true and perfect inventory and appraisement of all stocks and other property held in trust, and a statement of the financial affairs of the various companies whose stocks are held in trust.

" '(21) This trust shall continue during the lives of the survivors and survivor of the trustees in this agreement named, and for twenty-one years thereafter; provided, however, that if at any time after the expiration of ten years two-thirds of all the holders in value, or if after the expiration of one year, ninety per cent. of all the holders in value of trust certificates shall, at a meeting of holders of trust certificates called for that purpose, vote to terminate this trust at some time to be by them then and there fixed, the said trust shall terminate at the date so fixed. If the holders of trust certificates shall vote to terminate the trust as aforesaid, they may, at the same meeting or at a subsequent meeting called for that purpose decide by a vote of two-thirds in value of their number the mode in which the affairs of the trust shall be wound up, and whether the trust property shall be distributed or whether it shall be sold and the values thereof distributed, or whether part, and if so, what part shall be divided and what part shall be sold, and whether such sales shall be public or private. The trustees, who shall continue to hold their office for that purpose, shall make the distribution in the mode directed, or, if no mode be agreed upon by two-thirds in value, as aforesaid, the trustees shall make distributions of the trust property according to law. But said distribution, however made, and whether it be of property, or values, or of both, shall be just and equitable, and such as to insure to each owner of a trust certificate his due proportion of the trust property or the value thereof.

" '(22) If the trust shall be determinated by expiration of the time for which it is created, the distribution of the trust property shall be directed and made in the mode above provided.

"'(23) This agreement, together with the registry of certificates, books of accounts, and other books and papers connected with the business of said trust, shall be safely kept at the principal office of said trustees.'

"The second agreement being as follows:

"'Whereas, in and by an agreement dated January 2nd, 1882, and known as the Standard trust agreement, the parties thereto did mutually covenant and agree inter alia, as follows, to-wit: That corporations to be known as Standard Oil Companies, of various States, should be formed, and that all of the property, real and personal, assets and business of each and all of the corporations and limited partnerships mentioned or embraced in class first of said agreement should be transferred to and vested in the said several Standard Oil Companies; that all of the property, assets and business in or of each particular State should be transferred to and vested in the Standard Oil Company of that particular State, and the directors and managers of each and all of the several corporations and associations mentioned in class first were authorized and directed to sell, assign, transfer, convey and make over to the Standard Oil Company or Companies of the proper State or States, as soon as said corporations were organized and ready to receive the same, all the property, real and personal, assets and business of said corporations or associations; and, whereas, it is not deemed expedient that all of the companies and associations mentioned should transfer their property to the said Standard Oil Companies at the present time, and in case of some companies and associations it may never be deemed expedient that the said transfer should be made, and said companies and associations go out of existence; and whereas, it is deemed advisable that a discretionary power should be vested in the trustees as to when such transfer or transfers should take place, if at all.

"'Now, it is hereby mutually agreed between the parties to the said trust agreement and as supplementary thereto, that the trustees named in said agreement, and their successors, shall have the power and authority to decide what companies shall convey their said property as in said agreement contemplated, and when the said sales and transfers shall take place, if at all, and until said trustees shall so decide each of said companies shall remain in existence and retain its property and business, and the trustees shall hold the stocks thereof in trust, as in said agreement provided. In the exercise of said discretion the trustees shall act by a majority of their number, as provided in said trust agreement. All portions of said trust agreement relating to this subject shall be considered so changed as to be in harmony with this supplemental agreement.

"'In witness whereof, the said parties have subscribed this agreement, this 4th day of January, 1882.'

"7. Plaintiff further avers that the real object, purpose and intent of the firms, partnerships, individuals and corporations, in making and entering into said agreement and trust was and is to control and monopolize the petroleum industry in the United States and the several States thereof, and to monopolize and control the business of manufacturing, refining, selling and transporting petroleum and its products, refined oils, illuminating oils, and lubricating oils in the several States of the United States; that by said agreement said firms, individuals, partnerships, corporations, and companies therein mentioned intended to and did create, make and effect a combination of their capital, skill and acts for the purpose

of monopolizing and controlling the petroleum industry in the several States of the United States and the business of selling and dealing in petroleum and its products, refined, lubricating and illuminating oils, in the domestic trade of the various States of said United States; that by said agreement the said parties thereto intended and did make and effect a combination of their capital, skill and acts for the following purposes, in addition to the purposes named, to-wit:

"1st. To create and carry out restrictions in trade in petroleum and its products, refined, illuminating and lubricating oil, in the United States, and in the domestic trade of the States thereof.

"2nd. To increase the price of petroleum and its products, same being commercial commodities and of prime necessity to the people.

"3rd. To prevent competition in the manufacture, sale, and purchase of petroleum and its products.

"4th. To fix at a standard figure the price of petroleum and its products, whereby the price of same to the public shall be controlled and established, petroleum and its products being commodities of merchandise, intended for use and sale in the State of Texas as well as other States.

"5th. For the purpose of agreeing, obligating and binding themselves not to sell, dispose of, or transport petroleum and its said products below a common standard figure, and to keep the price of petroleum and its products at a fixed or graded figure, and establish and settle the price of petroleum and its products between themselves and others, and to preclude a free and unrestricted competition among themselves and others in the sale of petroleum and its products, and for the purpose of pooling, combining and uniting any interests they should and did have in connection with the sale of petroleum and its products, that the prices of same might be affected.

"7½. Plaintiff avers that the parties to said agreement intended by said agreement and did thereby create and effect a combination of their capital, skill and acts to effectuate and carry out the above named purposes in reference to petroleum and its products in the domestic trade and commerce in the State of Texas in said articles or commodities; that petroleum and the products thereof, especially refined oils, illuminating oils, and lubricating oils, are commodities and articles of commerce and of prime necessity to the people of this State and generally used by them.

"8. Plaintiff further avers that the nine persons who were appointed and named as trustees in and under the provisions of said trust agreements accepted their several positions and entered upon the discharge of the trust duties therein mentioned; that some of said trustees and others, to the number of nine, whose names are unknown to the plaintiff, have been reappointed and appointed at various times since the execution of said trust agreements, so that nine trustees have been ever since then and still are acting thereunder, and each and all of said trustees have been and are nonresidents of the State of Texas; that the offices and principal place of business of said trustees, have been ever since the execution of said trust agreements and still are in the City of New York, and the elections of said trustees and business transacted at their meetings by them have been had and done in said City of New York.

"9. That since the date of said trust agreements and up to the present time the parties thereto, as above shown, have carried out, and are still carring out, observing and performing, its stipulations, contracts and agreements and the objects and purposes of same as above stated; that to facilitate the performance of the stipulations of said agreements and to aid in carrying out and accomplishing the unlawful purposes above set out and stated, the markets in the United States for the sale of petroleum and its products have been divided by the trustees appointed by and under said agreements into various subdivisions, and the territory embraced in each of said subdivisions allotted to some members or member of said trust agreement with exclusive right and privilege to sell and deal in petroleum and its products therein; that one of such subdivisions designated and established as aforesaid includes the following territory in the United States, to-wit, Southwestern Missouri, Arkansas, Texas, Indian Territory, Oklahoma Territory, and a part of Louisiana; that one of the means used by the parties to said trust agreements to carry out and accomplish the unlawful purposes above mentioned of their said unlawful trust or combination is that whenever in any part of the subdivision allotted to either of said parties as aforesaid any individual or corporation not a member of or acting under or in accordance with said trust agreements brought or shipped any of the products of petroleum into said subdivision, or sold or attempted to sell any of such products therein in competition with the members

of said trust aforesaid, the party to said trust agreement doing business in such subdivisions would immediately cut the prices of such products in the particular locality where competition existed, far below the market price of such products and below the reasonable cost of same, and refuse to sell to anyone buying the competitive products, so that the individual or corporation selling such products in such subdivision and to merchants or other persons buying same from such individual or corporation would be compelled to sell same, if at all, at a loss, and said party would keep the prices so cut, as aforesaid, until the parties dealing in such competitive products were driven out of the market in such subdivision and the merchant or dealer buying same ceased to attempt to deal therein, and then, when by such means competition in said subdivision was stifled and driven out, the member of and party to said trust agreement would immediately raise the price of such products above the fair market price of same; that the member of and party to said trust agreement is enabled to pursue the above tactics successfully and thus drive out and throttle competition by means of the assistance and the indemnity from loss assured by the combined power and wealth of all the parties to said trust agreement.

"10. Plaintiff avers, that in violation of law and in abuse of its corporate powers and in the exercise of privileges, rights and franchises not conferred upon it, defendant, the Waters-Pierce Oil Company, became a party to said trust agreement, and since the 6th day of July, 1889, has in the State of Texas, by and through the other defendants above named, and its numerous local agents in this State, diligently observed, performed and carried out the purposes, objects and policies of said agreements as above shown. Plaintiff avers that said defendant, the Waters-Pierce Oil Company's mode of dealing in the products of petroleum, to-wit, refined oils, illuminating oils and lubricating oils, in this State, is as follows: Said company has established in various localities in this State, warehouses, tanks and other depositories and places for the storage and reception of its oils. Said company ships its oils into this State consigned to its managers and other agents, and said oils are stored in the receptacles from which they are sold in said State to merchants and others dealing therein by such managers and agents in such quantities as the buyer desires to purchase. The exact time at which said Waters-Pierce Oil Company became a party to

and began acting in pursuance of said trust agreement, and began carrying out, observing and performing its purposes and objects as above shown, plaintiff is unable to state, but plaintiff alleges that since the date of said defendant's said permit to do business in this State, it has observed, performed and carried out said trust agreement and the purposes, policies and objects as above shown. That said defendant so entered into and became a party to and carried out and observed and performed the same, and is still doing so as follows, to-wit: A sufficient number of the owners and holders of its capital stock to control the corporate acts of said company including some of its officers and directors, entered into said agreement without attaching the corporate name and seal of said defendant thereto, and the official designation of its officers. That prior to such action by said owners of defendant's capital stock, defendant's capital stock consisted of a great number of shares, the exact number of which, and the amount of each share plaintiff is unable to state, and upon the entering into said agreement in the manner aforesaid the shares of stock of said defendant company belonging to the persons who entered into said agreement in manner above set out (in what proportion, however, plaintiff is unable to state), where transferred by defendant's transferring officers upon defendant's stock books to the certain nine trustees who have been appointed and named in accordance with the provisions of said trust agreements upon the request of the respective owners of said shares and in pursuance of said trust agreements. Plaintiff avers that the number and amount of said shares and the names of the owners of same so transferred to said trustees as aforesaid, and the times when same were respectively transferred, and the number and amount of said shares now held by said trustees is unknown to plaintiff, but said facts appear on the books of said defendant company, and defendant is notified to produce said books or certified copies from same showing the above facts on the trial of this case, or secondary evidence will be introduced of said facts on the trial of this case. Plaintiff avers that in lieu of the transfer of said shares as aforesaid to said nine trustees, certificates of said Standard Oil trust, which are provided for and described in said trust agreements, equal to the appraised value of the stocks of said defendant company delivered to said trustees, as aforesaid, *was* issued and delivered by said nine trustees to the persons aforesaid from whom said nine trustees had received shares of stock in defendant company. The appraised

value of said stocks so transferred to said trustee, as aforesaid, was determined in the manner set forth in said agreement. Plaintiff charges further that said trustees have, in addition to the mode above stated, under the power given them in said trust agreements, purchased other stocks and bonds of said Waters-Pierce Oil Company, and now hold the same, in addition to the stock so transferred to them as aforesaid. Plaintiff alleges that it does not know the number and value and amount of said stock and bonds so purchased by said nine trustees, but that same is known to said defendant and appears on its books, and defendant is notified to produce said books, or copies from same showing such facts on the trial of this case, or secondary evidence will be introduced of such facts. Plaintiff avers that the capital stock of said Waters-Pierce Oil Company is $400,000, and the said trustees before mentioned still hold and control the shares of stock thereof which were transferred to and purchased by them, as aforesaid; that the number, amount, and value of the shares of stock of defendant Waters-Pierce Oil Company transferred to and purchased and held by said trustees, as aforesaid, is and has been sufficient to enable said trustees to exercise a supervising and controlling authority and power over the affairs of said Waters-Pierce Oil Company and the management, conduct and control of its business; that by virtue of so holding and controlling said shares the said nine trustees acting under said trust agreements, have since July 6th, 1889, and are still able to and do control the action of defendant in the selection of its officers and directors and in the conduct and management of its business in this and other States; that defendant, said Waters-Pierce Oil Company, has never taken any corporate action or made any complaint against the said stockholders or its directors and officers signing said trust agreements, nor against its said stockholders or officers surrendering or selling their stock in said defendant company to said nine trustees, nor against its stockholders or officers or directors receiving the Standard Oil certificates which were issued and delivered to them as aforesaid by said nine trustees in exchange for the shares of said defendant's stock, nor against any of the acts herein recited, and that none of the officers, directors or stockholders of defendant company, have at any time objected to or made complaint against such surrender and exchange of stock or against any of said recited acts, and, on the contrary, defendant, in its corporate capacity and through its officers and stockholders, has, ever since the acts

in question, acquiesced in such transfer and exchange and in the control and supervision of the election of its officers and in the conduct and management of its business exercised by said nine trustees; that the directors of the defendant's company, either directly or through their employees, manage the business of said defendant's company so as not to conflict with the policy fixed from time to time by the nine trustees as aforesaid, and that the net earnings of the defendant company have been ever since the time its stockholders entered into said trust agreements as aforesaid, and still are from time to time declared and paid out as dividends upon its capital stock; that the nine trustees appointed under said agreements as aforesaid have received the proportions of such dividends which were properly distributable and payable upon the stock held by said nine trustees in defendant company; that there are a large number of other corporations and companies (plaintiff being unable to ascertain the exact number) in the United States, whose stock is held and directors elected and whose affairs and business and dividends are conducted and paid under and pursuant to the provisions of the said trust agreement in a manner and to an extent similar to that herein described in respect to defendant, and from the dividends so accumulated in the hands of the said nine trustees dividends are from time to time, as the interest of the trust justify, declared and paid out by said nine trustees to the holders of the Standard Oil trust certificates which have been issued by them, so that the holders of the shares of said Standard Oil certificates which were received in lieu of the number of shares of defendant's stock transferred in manner as aforesaid to said nine trustees do not receive the dividends which are payable from the earnings of defendant's company, but receive the dividends only from the accumulated earnings aforesaid which are derived from the various similar companies aforesaid and held and distributed as aforesaid by said nine trustees. Plaintiff further avers that said Waters-Pierce Oil Company, through its directors, officers and agents, conforms its corporate action to the policy fixed by said nine trustees under said trust agreement for the control of the corporations and parties thereto, and pursues, carries out and executes the purposes and objects of said trust agreement, as above set out, in this State; that in pursuance of the policy fixed by said trust agreement it has occupied and still occupies and carries on its business exclusively in the subdivision of the territory of the United States designated and outlined as afore-

said, to-wit, in Southwestern Missouri, Arkansas, Texas, Indian Territory, and Oklahoma Territory, in the United States, and that it does not invade or transact any of its business in any portion of the territory allotted to other members or parties to said trust agreement or compete with them in same; that none of the other members or parties to said trust agreement enter with their business or compete with said Waters-Pierce Oil Company in the sale of its oils or otherwise in the above territory allotted to and accepted by said Waters-Pierce Oil Company; that said Waters-Pierce Oil Company adopts and pursues and carries out in said territory the same methods of driving out and overcoming competition in the sale of oils therein as is adopted and pursued by other members of said trust agreement in the particular territory in the United States in which their respective business is pursued; that in the market of Texas, by reason of said trust agreement and the purposes and policies of same, there is no competition in the sale of oils or other products of petroleum between said Waters-Pierce Oil Company and any member or party to said trust agreements; that by reason of the facts above stated the said Waters-Pierce Oil Company has monopolized and still monopolizes and controls the trade in petroleum and its products in Texas, and is enabled to and does carry out, observe and perform the unlawful purposes of said trust agreements in reference to the trade in said commodities, which are of prime importance and necessity to the people of this State.

"11. Plaintiff further shows that since the 6th day of July, 1889, said defendant, Waters-Pierce Oil Company, has been engaged and is still engaged in dealing in and selling the products of petroleum, such as refined oils, illuminating and lubricating oils, in this State; that during said time said company has made, and is still making, through its agents and officers in this State, contracts and agreements by and between it and various merchants and others dealing in, buying and selling similar oils in this State, by the terms of which agreements and contracts said merchants and other dealers in said commodities, in consideration that said defendant company would pay them a small rebate on the oil purchased by them or for other considerations unknown to plaintiff, agreed and contracted to and with said company that they would not buy any oils from any other company, person or corporation, but would deal with and buy and sell oils obtained from said defendant company exclusively; that said contracts so made, as aforesaid,

between said defendant company, through its agents and officers, and said merchants and other dealers in such oils are and were sometimes verbal and sometimes in writing; that among the merchants and other dealers in this State with whom defendant company has entered into and made such contracts are the following, to-wit:

"B. P. Stephenson, a resident of Yoakum, DeWitt county, Texas, said contract being made in the year 1892 or 1893; Hair & Gray, residents of Belton, Bell county, Texas, said contracts being entered into about July, 1894; Stayton & Howard, of McLennan county, Texas, said contract being made in 1892; E. F. Ehlinger, of Goliad county, Texas, said contract being made in the year 1892; E. A. Arnin, of Fayette county, Texas, said contract being made in the year 1894; H. Becker, of Washington county, Texas, said contract being made in the year 1893; H. Lillienstein, of Titus county, Texas, said contract being made in the year 1895; John Shumaker & Co., White & Bradshaw, and C. J. Rosenberg, of LaGrange, Fayette county, Texas; F. M. Ramsey, W. C. Burr, Laredo, Texas.

"12. Plaintiff avers that said defendant company through its officers and agents since said 6th day of July, 1889, has made and still is entering into and making contracts and agreements both verbal and in writing with various and sundry merchants and others dealing in, buying and selling oils, the product of petroleum, in this State, by the terms of which said merchants and others dealing in such oils as aforesaid contracted and agreed with said defendant company to buy from and sell the oils of said company exclusively, and in some instances further agreed not to sell the oils so bought as aforesaid from said defendant company to anyone buying from or dealing with any other person or corporation dealing in such oils in competition with said defendant company. That among the merchants and other dealers with whom such contracts were made and the time and place when same were made and entered into are the following, to-wit:

"W. A. Bryan, of McLennan county, Texas, in 1892 and 1893.

"J. W. Thomason, of McLennan county, Texas, in 1894.

"Herman Voss, of Coryell county, Texas, in August, 1893.

"Hair & Gray, of Bell county, Texas, in 1894.

"W. N. Foster, of Brazos county, Texas, in 1892.

"T. A. Fuller, of Bowie county, Texas, in 1891.

"13. Plaintiff further avers that said defendant company since

July 6th, 1889, has made and entered into, and still is making and entering into, through its officers and agents in this State, agreements and contracts by and between it and various merchants and others dealing in and buying and selling oils, the products of petroleum, by the terms of which said merchants and others dealing in such oils contract and agree with said defendant company after purchasing from it its said oils to sell the same to others desiring to purchase from them at prices fixed and established by it or its agents and officers. That among the merchants and other dealers so making and entering into such contracts are the following, to-wit:

"W. A. Bryan, a resident of McLennan county, Texas, said contract made in 1892 or 1893.

"W. F. Manning, a resident of Caldwell county, Texas, said contract made in the latter part of 1892.

"H. Schmidt, a resident of Robertson county, Texas, said contract made about the year 1892 or 1893.

"14. Plaintiff avers that prior to July 6th, 1889, to-wit, about the year 1881, the said defendant company entered into a contract in writing with certain jobbers and wholesale merchants in the city of Brownsville, Texas, among whom was the firm of Bloomberg & Raphael, by which said defendant company purchased the oil of said firm then on hand, and said firm of Bloomberg & Raphael agreed and became bound to purchase from said defendant company all future requirements of oil at prices established by said defendant company and its agents. From which prices said firm was to receive a rebate of fifteen cents per box on making settlement therefor at the end of each month. Said rebate to be extended only to those who are parties to said contract, and said jobbers and wholesalers and said firm of Bloomberg & Raphael were to sell said oil to retail dealers at the invoice price of same fixed by said defendant company. That plaintiff is unable to give a better description of said contract for the reason the same is in the possession of the defendant. Plaintiff further alleges that after the 6th day of July, 1889, the said defendant carried out and continued to do business with said firm under said contract until about the 6th day of October, 1896, insisted upon all its provisions.

"15. Plaintiff also avers that said defendant company on or about January 1st, 1890, entered into a contract in writing with J. S. & M. H. Cross, wholesale merchants in the city of Brownsville,

whereby it was agreed that said firm was to buy all oil needed in its business from said defendant company, and the said dealers were to receive from said defendant one and one-half cents per gallon rebate and said firm further agreeing not to sell oil for a price less than the schedule invoice price of said company, said contract by its provisions could be cancelled by notifying the company ten days in advance. By the terms of said contract said firm became bound to buy all its oils from said defendant, and were also bound to sell at a price fixed by said defendant, and that under said contract the said defendant has been since said date doing business with said firm.

"16. That since July 6th, 1889, the said defendant company has been selling oil to J. H. Fernandez, a merchant in the city of Brownsville, under a contract in writing by which said Fernandez was to buy all oil bought by him in his business from said defendant company, and was to receive from said company a rebate of fifteen cents per box on the invoice price, and it was further agreed that said Fernandez shall sell oil at a price fixed by said defendant company, and in case oil was purchased from any one else said merchant was subject to pay the said defendant company a penalty in money. That under said contract said defendant company did business with said merchant until about December 23rd, 1896.

"17. That plaintiff alleges that previous to December 24th, 1896, the said defendant company had for many years been doing business and selling oil to M. Alonzo and other mershants in the city of Brownsville, Texas, under a contract in writing with said parties, duly executed, by which said Alonzo and also said other merchants agreed to buy all their oils used in their business respectively from said defendant company, and was to receive a rebate of twenty cents per box on the better quality and fifteen cents per box on common oil, and the said defendant agreed to make a reduction on the price of oil in case there was other oil on the market selling at a lower price than the company's price. The contract could be cancelled by giving the company ten days notice, and said company fixed the minimum price at which said oil could be sold by said merchants; that under said contract said parties thereto did business thereunder and in said manner until said December 24th, 1896.

"18. That previous to December 24th, 1896, the said defendant company had for many years been doing business with and

selling oil to Nicholas Lopez of the city of Brownsville, Texas, under a contract in writing by which said Lopez was to buy all his oil from said company and was to receive a rebate of fifteen cents per box on all oil purchased by him from said company, said contract to be cancelled at any time by giving ten days notice to said company, and said Lopez was further required to sell no oil at a price less than the invoice price and by the terms of said contract said Lopez was subject to a penalty of twenty-five dollars in case he purchased oil from any one else other than said company defendant; that under said contract said parties did business thereunder and in the manner mentioned therein until December 24th. 1896.

"19. That for about three years prior to October 8th, 1896, the said defendant company did business with and sold oil to Miguel Fernandez, a merchant in the city of Brownsville, under a contract in writing stipulating that said merchant should buy all his oils from said defendant company and receive a discount of fifteen cents per box upon the invoice price, and was bound thereby not to sell oil for less price tha nthe invoice price under a penalty of fifty dollars payable to said defendant company.

"20. That defendant company is seeking to renew all of said contracts above alleged as having been cancelled and is seeking to carry on its said business in said city under same.

"21. Plaintiff avers that all of such contracts as alleged and above described were made by the agents of said defendant company and were authorized by it, and were fully ratified and carried out by said company after same had been so made. The plaintiff cannot give more definitely the terms, considerations and dates of such contracts than as above given, because same are unknown to plaintiff. Plaintiff notifies said defendant to produce on the trial of this case the written contracts or copies of same made by it as above alleged with said merchants and others dealing in said oils, or secondary evidence of their contents will be introduced on the trial of this case.

"22. Plaintiff further shows that the Eagle Refining Company was and is a private corporation legally incorporated under the laws of the State of Ohio; that its principal office and officers are located in the city of Cleveland, Ohio; that the capital stock of said corporation was and is the sum of fifty thousand dollars; that the purposes and objects for which said company was incorporated and

formed was and is to manufacture, refine, compound, purchase and deal in all kinds of oils and greases, petroleum and its various products and all things incident thereto for profit. Plaintiff avers that it does not know the names and residence of its officers or any of its agents; that it is informed and so states that it has now no officers or agents in this State; that on, to-wit, the 6th day of November, A. D. 1891, said company filed in the Department of State in the State of Texas, a certified copy of its articles of incorporation, in accordance with the requirements of law, and paid the fee required by law and obtained a permit to carry on its business in this State; that under and by virtue of said authority so obtained as aforesaid said company, on said date, began to transact business in this State; that from said date said company began to pursue and carry on the business in this State of dealing in selling and trading the products of petroleum consisting of refined, illuminating and other oils, in honest and sharp competition with said Waters-Pierce Oil Company; that said corporation continued to pursue and carry on said business in its name in this State from said date up to about the 13th day of October, 1894, at which date the said Eagle Refining Company and th said Waters-Pierce Oil Company made and entered into a certain agreement, combination and trust, the exact terms of which are unknown to your petitioner, but petitioner charges that same was in writing, and the said defendant is hereby notified to produce same, or a certified copy thereof, on the trial of this cause, or secondary evidence of its contents will be introduced. Plaintiff alleges that by the terms of said agreement the Waters-Pierce Oil Company bought, obtained or leased, or secured the control of all the property and business and franchises of said Eagle Refining Company in said State of Texas and other States, and obtained and secured the exclusive right to operate its business and exercise its privileges and franchises and use its name, labels and trade-marks in this State and other States, and the said Eagle Refining Company agreed to withdraw from doing any business in said State in competition with said Waters-Pierce Oil Company for the period of fifteen years; that since said date said Waters-Pierce Oil Company has been doing business in this State in the name of the Eagle Refining Company, said business being carried on in apparent but not real competition with said Waters-Pierce Oil Company and said business consisting of dealing in and selling the products of petroleum, refined oils, lubricating and illuminating oils. Plaintiff

avers that the said Waters-Pierce Oil Company and said Eagle Refining Company were and are corporations engaged in the same line of business, and that said contract or agreement above stated affected the production of petroleum and also affected the sale of its products in this State, said petroleum and its products being articles of such general use that the public is interested in the production and sale of same.

"23. Plaintiff further avers that previous to the year 1890 one C. W. Robinson, a resident of Houston, Harris county, Texas, in this State, was engaged independently and in his own name and for himself and dealing in, buying and selling various kinds of oil, the products of petroleum, in this State, in competition with said Waters-Pierce Oil Company; that about the —— day of 1890, the said C. W. Robinson and Waters-Pierce Oil Company made and entered into an agreement by the terms of which the said Waters-Pierce Oil Company obtained and secured the control, management and conduct of the said business of C. W. Robinson, and by the terms of which, though said business is conducted in the name of C. W. Robinson, as before said date, yet same is really controlled and conducted by said Waters-Pierce Oil Company; that by the terms of said contract and agrement the said C. W. Robinson is to buy and sell exclusively the oils of said Waters-Pierce Oil Company, and refrain from dealing in, buying or selling any oils obtained from any other course; that by the terms of said contract the said business of C. W. Robinson is carried on in the name of C. W. Robinson, and in apparent but not real competition with the Waters-Pierce Oil Company; that said contract and agreement has been since the said date of the making of same and still is in full force and effect.

"24. Plaintiff avers and charges that the above described contracts and agreements by and between the said defendant, Waters-Pierce Oil Company, and the various merchants and others dealing in oils in this State, and particularly the above described agreement by and between said company and the Eagle Refining Company and the above described agreement by and between Waters-Pierce Oil Company and said C. W. Robinson, were each and all intended to and did create and result in a combination of their capital, skill and acts of said Waters-Pierce Oil Company, and said several merchants and others dealing in oils in this State and between said Waters-Pierce Oil Company and said Eagle Refining Company and betwen

said Waters-Pierce Oil Company and said C. W. Robinson for the following purposes, to-wit:

"1st. To create and carry out restrictions in trade, to-wit, in the buying and selling of products of petroleum, refined oils, illuminating oils in this State.

"2nd. To increase the price of said products of petroleum in this State.

"3rd. To prevent competition in the sale and purchase of petroleum and its products in this State.

"4th. To fix at a standard or figure the price of said petroleum and its products whereby its price to the public should be controlled and established.

"5th. For the purpose of binding and obligating said parties to said agreements not to sell and dispose of petroleum and its said products below a common standard figure and to keep the price of same at a fixed or graded figure and to establish and settle the price of said petroleum and its products between themselves and others so as to preclude free and unrestricted competition among themselves and others in the sale of same, and to pool and combine and unite their interests in the sale of same that its price might be affected.

"Plaintiff alleges that petroleum and its products are commodities and articles of merchandise of prime necessity to the people and generally used and consumed by them, and are commodities intended for sale, use and consumption in this State; that said agreement and contracts resulted in effecting and carrying out said above named purposes to the great injury and detriment of the people of this State.

"25. Plaintiff further avers that said Waters-Pierce Oil Company, since the date of its said permit to transact its busines in this State, has been and is now guilty of gross abuse and misuse of its chartered privileges and franchises in this State, for plaintiff says that in order to monopolize and control the oil trade in this State said Waters-Pierce Oil Company, through its officers and agents, has unlawfully entered into and carried out the said contracts and agreements above set forth, and has entered into and is still engaged in making and carrying out similar contracts and agreements with other merchants and dealers in oils in this State; that the course of business pursued by said company in this State is as follows: Whenever in any locality in this State any person or corporation

sells or buys the products of petroleum obtained from any person or corporation except said Waters-Pierce Oil Company or deals in oils in competition with said company said Waters-Pierce Oil Company, through its agents and officers, immediately cuts the price of its oils below the reasonable and fair market price of same, and refuses to sell the same at all or except at an exhorbitant and higher price than the price at which it sells to those dealing exclusively with it, to those merchants or other dealers who buy such competitive oils; that at said times and places said Waters-Pierce Oil Company, through its officers and agents pursues and carries out a system of threats and intimidation and bribery to prevent parties dealing in oils in this State from buying and selling competitive oils, for plaintiff says said Waters-Pierce Oil Company, through its officers and agents, refuses to sell its oils to parties buying any competitive oils, threatens said parties intending to or purchasing such competitive oils with a ruinous reduction in the price of said oils and with loss to them in dealing in same, and pays rebates in the price of oils to induce buyers of oils not to patronize a competitor in its business, and by offers of money or the payment of the expense incident thereto seeks to get and does induce parties ordering such competitive oils for the purpose of selling same to countermand such orders and refuse to take same after entering into a contract to purchase. Plaintiff alleges that the above is the general course of dealing pursued throughout this State by said Waters-Pierce Oil Company, through its agents and officers, in the transaction of its business; that after the competitive oil is by such methods driven out of the markets in this State the said Waters-Pierce Oil Company, through its officers and agents, immediately raises the price of its oils far above the true and reasonable market value of same, and extort such unreasonable and exorbitant prices from the consumers of oil in this State, and keeps its oil at such prices.

"That the above stated course of dealing by said Waters-Pierce Oil Company has resulted in the complete monopolization by said company of the oil trade of this State and in stifling and throttling legitimate competition in same, to the great injury of the people of this State.

"26. Plaintiff avers that by reason of the contracts, agreements, combinations and trusts made and entered into by said Waters-Pierce-Oil Company, through its stockholders, officers, directors, and agents, as above alleged and shown, and by reason of the gross abuse

and misuses by said Waters-Pierce Oil Company of its corporate privileges and franchises in this State, as above shown, said Waters-Pierce Oil Company has forfeited its right and permit to do business in this State; that the said unlawful combinations, agreements, conspiracies and trusts, made and entered into and carried out by said defendant company and its officers and agents in this State, and said abuses and misuse of its corporate powers by said company, as above stated and shown, are frauds upon this State, in violation and contravention of its laws, in restraint of trade, destructive of competition, and tends to and do create a monopoly in this State, and that same now are and unless prohibited will continue to be grievous burdens upon the people of this State and the public, and are against public policy and should be restrained."

The statement of the pleadings of defendant, as contained in brief of plaintiffs in error, is substantially correct, and therefore will not be repeated here.

The case was tried on the 15th of June, 1897. Defendant, among other things, made the following written admission:

"It is agreed by and between the parties hereto as follows:

"1. The allegations made in paragraphs 1, 22 3 and 4 of plaintiff's first amended original petition are admitted to be true.

"2. The facts alleged in paragraph 5 are admitted, but the allegations or conclusion that such facts constituted an unlawful combination or trust is denied.

"3. The facts and allegations, including the agreement, set out and stated in paragraph 6 of said amended petition are admitted, except that it is not admitted that said facts or agreements constituted an unlawful combination, trust or agreement.

"4. It is agreed that the printed copy of an agreement of the Standard Oil trust and the proceedings of the certificate holders entered into in the City of New York on the 21st day of March, 1892, providing for the dissolution of the trust and the winding up of its affairs, shall be admitted in evidence, it being the same agreement, and the proceedings agreed to be admitted in the case of the State of Texas vs. E. T. Hathaway, et al., tried in the district court of McLennan county, Texas.

"5. The facts and allegations made in paragraph 8 of plaintiff's said amended petition are admitted.

"6. In relation to paragraph 9, it is admitted that the Waters-Pierce Oil Company sells illuminating oils in southern Missouri, Arkansas, Louisiana west of the Mississippi river, Texas, Indian Territory, and in Old Mexico, without competition therein on the part of any of the persons, companies, and corporations mentioned in paragraph 6 of the bill, and that the Waters-Pierce Oil Company does not sell said oils elsewhere."

The companies referred to in the paragraph of the agreement last quoted, and set forth in paragraph 6 of said first amended original petition, are as follows: Acme Oil Company (New York); Acme Oil Company (Pennsylvania); Atlantic Refining Company

of Philadelphia; Bush & Co., Limited; Camden Consolidated Oil Company, Elizabethport Acid Works, Imperial Refining Company, Limited; Chas. Pratt & Co., Paine Ablett & Co., Limited; Standard Oil Company (Ohio); Standard Oil Company (Pittsburg); Smith's Ferry Oil Trans. Company, Solar Oil Company, Limited; Sone & Fleming Manufacturing Company, Limited; American Lubricating Oil Company, Baltimore United Oil Company, Beacon Oil Company, Bush & Deanslow Manufacturing Company, Central Refining Co., of Pittsburg; Cheseborough Manufacturing Company, Chess-Carley Co.,Consolidated Tank Line Co., Inland Oil Co., Keystone Refining Co., Maverick Oil Co., National Transit Co., Portland Kerosene Oil Co., Producers' Consolidated Land and Petroleum Co., Signal Oil Works, Limited; Thompson & Bedford Co., Limited; Devoe Manufacturing Co., Eclipse Lubricating Oil Co., Limited; Empire Refining Co., Limited; Franklin Pipe Co., Limited; Galena Oil Works, Limited; Galena Farm Oil Co., Limited; Germania Mining Co., Vacuum Oil Co., H. C. Tan Vine & Co., Limited.

The court instructed the jury that the evildence was not sufficient to show that the Waters-Pierce Oil Company was a member of the Standard Oil trust in such a manner that violated the trust laws of the State, and that all testimony upon that branch of the case would, therefore, be disregarded. (R., p. 48, Subdivision 17.)

The court also instructed the jury that the agreement with the Eagle Refining Company, C. W. Robinson, J. L. Lewis and Stilwell Bros. were not violative of the law and evidence in reference to these matters was to be considered only as to the course of dealing of the defendant company in the State. (R., p. 48, Subdivision 18.)

The court also instructed the jury to find for the defendants Hathaway, Austin, Grice, Keenan and Fries, as they were only agents of the defendant company and not liable in the forms charged in the suit. (R., p. 49, Subdivision 21.)

Numerous instructions were requested by both sides and refused by the court. A verdict was rendered in favor of the State against the Waters-Pierce Oil Company and a judgment rendered enjoining it and cancelling its permit to do business within the State and perpetually enjoining and restraining it and its agents from doing business within the State. The judgment further provided that nothing therein should be construed to in any way affect, apply or pro-

hibit the defendant's right to engage in interstate commerce. (R., pp. 41 and 42.)

The case was appealed to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, and by that court affirmed, after motions for new trial and motions for arrest of judgment had been made and overruled in the court below. The judgment of the trial court was affirmed by that court. (R., p. 180.) The opinion of the court of civil appeals affirming the case will be found in the record, pages 161 to 179 inclusive. Motion for rehearing was made and overruled. (R., p. 180.) Petition for writ of error was filed in the supreme court. (R., p. 196.) Writ of error was refused by that court. (R., p. 207.) Motion for rehearing was made in the supreme court, which was overruled. (R., pp. 208 to 211.) The case was brought here by writ of error by the Waters-Pierce Oil Company, assigning the following errors:

"I.

"The court of civil appeals of the State of Texas erred in holding with the trial court that the statutes of the State of Texas of 1889 and 1895, commonly known as the anti-trust acts, were not violative of the Constitution of the United States, because said acts expressly discriminate in their operation and effect between persons and classes and deny to many persons and classes of persons the equal protection of the laws. They prescribe penalties of felony against artisans, mechanics, merchants, and professional men for acts which they expressly authorize farmers and stock raisers to do. Such distinction is purely arbitrary, without reason for its support, vicious in purpose, and expressly violative of the fourteenth amendment to the Constitution of the United States.

"II.

"The court further erred in holding that said acts did not violate the Constitution of the United States, because said acts did not exempt, except indirectly, certain classes of citizenship from their operation, but they exempted certain classes of property, the annual earnings of the farmer and stock raiser, from denunciation while such earnings remain in the hands of the original producer and raiser, and they also exempt laborers who may combine for the purpose of raising their wages. While the natural effect of these laws is to practically exempt some farmers and stock raisers under certain state of circumstances from the pains and penalties of combination for the purpose of affecting prices, yet all farmers and all stock raisers are not treated alike, even with reference to their annual earnings. There is, therefore, an absence of that classification upon which the court reposes for the justification of its ruling.

"III.

"The court further erred in holding said statutes not violative of the Constitution of the United States, because they in their natural operation and effect deprive many citizens and persons of their property and liberty without due process of law. They deprive many persons and citizens of the same right and liberty of contract with reference to their property and business affairs which they guarantee to other persons and citizens, and they take from many

persons and citizens their rights of property by mere statutory enactment, without due condemnation, according to the law of the land.

"IV.

"The court further erred in holding that said statutes were not violative of the Constitution of the United States, because said statutes (Section 4) assume the power of the State to deny to every foreign corporation the right to do any business in Texas, interstate or otherwise, and it was not competent for the trial court or court of civil appeals of the State of Texas by judicial limitation, as was attempted and had in this case, to restrict the operation of said sections to local business alone, as said section in each act must be construed as an entirety and are not separable by judicial construction so as to eliminate a manifest unconstitutionality as to the jurisdiction of the State and her courts, and to validate by judicial construction portions of the section as applicable solely to local business.

"V.

"The court further erred in holding said statutes not to be violative of the solely to local business.
Constitution of the United States, because said statutes usurp and were intended to usurp the authority and jurisdiction of the United States and the other States in the matter of prosecution for acts occurring beyond the territorial limits of the State of Texas.

"VI.

"The court erred in holding with the trial court that the case at bar was a controversy of a civil nature and in approving the ruling of the court below in refusing to instruct the jury, upon request by plaintiff in error, that if upon all the evidence the jury should entertain a reasonable doubt of the guilty participancy of the plaintiff in error with any unlawful acts of its agents, then the jury would find for the plaintiff in error, the case being one essentially criminal in all its features and not a controversy of a civil nature."

The anti-trust statute originally passed in 1889 by the Texas Legislature reads as follows:

"Section 1. Be it enacted by the Legislature of the State of Texas: That a trust is a combination of capital, skill, or acts by two or more persons, firms, corporations, or associations of persons, or of either two or more of them for either, any, or all of the following purposes: First—To create or carry out restrictions in trade. Second—To limit or reduce the production, or increase or reduce the price of merchandise or commodities. Third—To prevent competition in manufacture, making, transportation, sale, or purchase of merchandise, produce, or commodities. Fourth—To fix at any standard or figure, whereby its price to the public shall be in any manner controlled or established, any article or commodity of merchandise, produce, or commerce, intended for sale, use, or consumption in this State. Fifth—To make or enter into, or execute or carry out any contract, obligation, or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of, or transport any article or commodity, or article of trade, use, merchandise, commerce, or consumption below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves or others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine, or unite any interest they may have in connection with the sale or transportation of

any such article or commodity that its price might in any manner be affected.

"Sec. 2. That any corporation holding a charter under the laws of the State of Texas which shall violate any of the provisions of this act shall thereby forfeit its charter and franchise, and its corporate existence shall cease and determine.

"Sec. 3. For a violation of any of the provisions of this act by any corporation mentioned herein, it shall be the duty of the Attorney-General or District or County Attorney, or either of them, upon his own motion, and without leave or order of any court or judge, to institute suit or quo warranto proceedings in Travis County, at Austin, or at the county seat of any county in the State, where such corporation exists, does business, or may have a domicile, for the forfeiture of its charter rights and franchise, and the dissolution of its corporate existence.

"Sec. 4. Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business within this State; and it shall be the duty of the Attorney-General to enforce this provision by injunction or other proper proceedings in the District Court of Travis county, in the name of the State of Texas.

"Sec. 5. That the provisions of Chapter 48, General Laws of this State, approved July 9, 1879, to prescribe the remedy and regulate the proceedings by quo warranto, etc., shall, except in so far as they may conflict herewith, govern and control the proceedings when instituted to forfeit any charter under this act.

"Sec. 6. Any violation of either or all of the provisions of this act shall be and is hereby declared a conspiracy against trade, and any person who may be or may become engaged in any such conspiracy, or take part therein, or aid or advise in its commission, or who shall, as principal, manager, director, agent, servant, or employe, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, or orders thereunder, or in pursuance thereof, shall be punished by fine not less than fifty dollars nor more than five thousand dollars, and by imprisonment in the penitentiary not less than one nor more than ten years, or by either such fine or imprisonment. Each day during a violation of this provision shall constitute a separate offense.

"Sec. 7. In any indictment for an offense named in this act, it is sufficient to state the purposes or effects of the trust or combination, and that the accused was a member of, acted with or in pursuance of it, without giving its name or description, or how, when, or where it was created.

"Sec. 8. In prosecutions under this act it shall be sufficient to prove that a trust or combination as defined herein exists, and that the defendant belonged to it or acted for or in connection with it, without proving all the members belong to it, or proving or producing any article of agreement or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all. The character of the trust or combination alleged may be established by proof of its general reputation as such.

"Sec. 9. Persons out of the State may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this act, which do not in their commission necessarily require a personal presence in this State, the object being to reach and punish all persons offending against its provisions whether within or without the State.

"Sec. 10. Each and every firm, person, corporation, or association of persons who shall in any manner violate any of the provisions of this act, shall for each and every day that such violation shall be committed or continued, forfeit and pay the sum of fifty dollars, which may be recovered in the name of the State of Texas in any county where the offense is committed, or where either of the offenders reside, or in Travis county, and it shall be the duty of the Attorney-General or the District or the County Attorney to prosecute for and recover the same.

"Sec. 11. That any contract or agreement in violation of the provisions of this act shall be absolutely void and not enforceable either in law or equity.

"Sec. 12. That the provisions hereof shall be held cumulative of each other and of all other laws in any way affecting them now in force in this State.

"Sec. 13. The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser."

"Approved March 30th, 1889. Acts of 1889, p. 141."

In 1895 another act was passed by the Texas Legislature which reads as follows:

"TRUSTS.

"Chapter 83.—[H. B. No. 404.] An act to define trusts, provide for penalties and punishment of corporations, persons, firms and associations of persons connected with them, and to promote free competition in the State of Texas, and to repeal all laws and parts of laws in conflict with this act.

"Section 1. Be it enacted by the Legislature of the State of Texas: That an act entitled 'An act to define trusts and to provide for penalties and punishment of corporations, persons, firms and associations of persons connected with them, and to promote free competition in the State of Texas,' approved March 30, 1889, be so amended as to hereafter read as follows:

"Section 1. That a trust is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or either two or more of them, for either, any or all of the following purposes:

"1. To create or carry out restrictions in trade (or commerce or aids to commerce, or to create or carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this State).

"2. To increase or reduce the price of merchandise, produce or commodities.

"3. To prevent competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, (or to prevent competition in aids to commerce).

"4. To fix at any standard or figure, whereby its price to the public shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this State.

"5. To make or enter into or execute or carry out any contract, obligation or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graded figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected.

"Sec. 2. That any corporation holding a charter under the laws of the State of Texas which shall violate any of the provisions of this act shall thereby forfeit its charter and franchise, and its corporate existence shall cease and determine.

"Sec. 3. For a violation of any of the provisions of this act by any corporation mentioned herein it shall be the duty of the Attorney-General or district or county attorney, or either of them, upon his own motion and without leave or order of any court or judge, to institute suit or quo warranto proceedings in Travis county, at Austin, or at the county seat of any county in the State where such corporation exists, does business or may have a domicile,

for the forfeiture of its charter rights and franchise and the dissolution of its corporate existence.

"Sec. 4. Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business within this State, and it shall be the duty of the Attorney-General to enforce this provision by injunction or other proper proceedings in the district court of Travis county, in the name of the State of Texas.

"Sec. 5. That the provisions of chapter 48, general laws of this State, approved July 9, 1879, to prescribe the remedy and regulate the proceedings by quo warranto, etc., shall, except in so far as they may conflict herewith, govern and control the proceedings when instituted to forfeit any charter under this act.

"Sec. 6. If any person shall be or may become engaged in any combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or of either two or more of them, for either, any or all of the following purposes:

"1. To create or carry out restrictions in trade or commerce or aids to commerce, or to create or carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this State.

"2. To increase or reduce the price of merchandise, produce or commodities.

"3. To prevent competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or to prevent competition in aids to commerce.

"4. To fix at any standard or figure whereby its price to the public shall be in any manner controlled or established any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this State.

"5. To make or enter into or execute or carry out any contract, obligation or agreement of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of, or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption, below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves and others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its prices may in any manner be affected, or aid or advise in the creation or carrying out of any such combination, or who shall as principal, manager, director, agent, servant or employe, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, directions, conditions or orders of such combinations, shall be punished by fine of not less than fifty nor more than five thousand dollars, and by imprisonment in the penitentiary not less than one nor more than ten years, or by either such fine or imprisonment. Each day during a violation of this provision shall constitute a separate offense.

"Sec. 7. In any indictment for an offense named in this act it is sufficient to state the effects or purposes of the trust or combination, and that the accused was a member of, acted with or in pursuance of it, without giving its name or description, or how, when or where it was created.

"Sec. 8. In prosecutions under this act it shall be sufficient to prove that a trust or combination as defined herein exists and that the defendant belonged to it or acted for or in connection with it, without proving all the members belonging to it or proving or producing any article of agreement or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all. The character of the trust or combination alleged may be established by proof of its general reputation as such.

"Sec. 9. Persons out of the State may commit and be liable to indictment

and conviction for committing any of the offenses enumerated in this act, which do not in their commission necessarily require a personal presence in this State, the object being to reach and punish all persons offending against its provisions, whether within or without the State.

"Sec. 10. Each and every firm, person, corporation or association of persons who shall in any manner violate any of the provisions of this act shall for each and every day that such violation shall be committed or continued forfeit and pay the sum of fifty dollars, which may be recovered in the name of the State of Texas in any county where the offense is committed, or where either of the offenders reside, or in Travis county, and it shall be the duty of the Attorney-General or the district or county attorney to prosecute for and recover the same.

"Sec. 11. That any contract or agreement in violation of the provisions of this act shall be absolutely void and not enforceable either in law or equity.

"Sec. 12. That the provisions hereof shall be held cumulative of each other and of all other laws in any way affecting them now in force in this State; provided, this act shall not be held to apply to live stock and agricultural products in the hands of the producer or raiser, nor shall it be understood or construed to prevent the organization of laborers for the purpose of maintaining any standard of wages.

"Sec. 13. That nothing in this act shall be held or construed to affect or destroy any rights which may have accrued, or to affect the right of the State to recover penalties, or to affect the right of the State to forfeit charters of domestic corporations and prohibit foreign corporations from doing business in this State, or affect the right of the State to maintain prosecutions for violations thereof, under any law of this State relating to trusts, for acts heretofore done.

"Sec. 14. Any court, officer or tribunal having jurisdiction of the offense defined in this act, or any district or county attorney or grand jury may subpoena persons and compel their attendance as witnesses to testify as to the violation of any of the provisions of the foregoing sections. Any person so summoned and examined shall not be liable to prosecution for any violation of said sections about which he may testify fully and without reservation.

"Sec. 15. All laws or parts of laws in conflict with this act are hereby repealed.

"Sec. 16. Whereas, the people of this State are without an adequate remedy against trusts, therefore an emergency and imperative public necessity exists requiring that the constitutional rule which requires that all bills shall be read on three several days be suspended, and it is so enacted.

"Approved April 30, 1895."

Both of these acts were assailed in the assignments of error. The act of 1889 is not expressly repealed. If the act of 1895 is valid it of course impliedly repealed the act of 1889 in so far as they are in conflict. If the act of 1895 is invalid, it is incapable of repealing the act of 1889, and, therefore, leaves it in force.

The statutes in question are police regulations.

While it is difficult to get an exact definition of "police power," applicable to all cases, it is not necessary to do so in this instance. Mr. Cooley has stated that the term has been defined as "the general power of the government to preserve and promote the public welfare, even at the expense of private rights." (Cooley's Consti-

tutional Limitations, 6th ed., 624; Tiedman's Limitations of Police Power, Sec. 1.)

From this definition it would appear that if the public welfare can be best promoted by preventing the character of contracts which these statutes seek to prohibit, certainly they should be classified as police regulations.

The Supreme Court of Louisiana said:

"Police power is the right of State functionaries to prescribe regulations for the good order, peace, protection, comfort and convenience of the community, which do not encroach on the like power vested in Congress by the Federal Constitution." (N. O. Gas Lighting Co. vs. Hart, 40 La. Annl., 474.)

This court has said:

"Every law comes within this description (of police regulations) which concerns the welfare of the whole people of the State, or any individual within it; whether it relates to their rights or their duties; whether it respects them as men or citizens of the State; whether in their public or private relations; whether it relates to the rights of persons or property, of the whole people of a State, or of any individual within it; and whose operation is within the territorial limits of the State, and upon persons and things within its jurisdiction." (Mayor of New York vs. Miln, 11 Pet., 139.)

The Supreme Court of Maine has said:

"With the legislature, the maxim of law, salus populi suprema lex, should not be disregarded. * * * How far the provisions of a legislative act extend is always submitted to its discretion; provided these acts do not go beyond the great principle of securing the public safety." (State vs. Noyes, 47 Me., 211.)

The Supreme Court of Illinois said:

"The police power of a State is co-extensive with self-protection, and is not inapplicably termed the 'law of overruling necessity.' It is the inherent and plenary power of the State which enables it to prohibit all things hurtful to the comfort and welfare of society." (Lake View vs. Rose Hill Cemetery Co., 70 Ill., 192.)

The following cases likewise give definitions of police power not inapplicable to the case at bar:

Stone vs. Mississippi, 101 U. S., 814.
Boston Beer Co. vs. Massachusetts, 97 U. S., 25.
Commonwealth vs. Alger, 7 Cush. (Mass.), 84.
Thorpe vs. Rutland R. R. Co., 27 Vt., 149.

Cases discussing police regulations in the form of quarantine laws and in the regulation of slaughter houses, fairly illustrate the right of a State to pass the statutes under discussion.

Slaughter House Cases, 16 Wall., 36.
Butchers' Union, etc., Co. vs. Cresson City, etc., 111 U. S., 746.

New Orleans vs. Stafford, 27 La. Annl., 417.
Cooley's Constitutional Limitations, 4 Ed., 506.
State vs. Natal, 39 La. Annl., 439.

In the exercise of this power States have a right to forbid the adulteration of food products.

State vs. Campbell, 64 N. H., 402.
People vs. West, 44 Hun., 162.
People vs. Arensberg, 105 N. Y., 123.
Waterbury vs. Newton, 50 N. J. L., 534.
By the same power water sources are preserved from polution.
State vs. Wheeler, 44 N. J. L., 88.

Burial grounds are located and drainage systems are inaugurated by virtue of this power.

Commonwealth vs. Waite, 11 Allen (Mass.), 264.
State vs. Campbell, supra.

By the same power all acts deemed injurious to public morals are prohibited.

Thompson vs. State, 17 Texas Appeals, 253.
Cooley's Constitutional Limitations, 4 Ed., 596.

But it must not be supposed for a moment that the police power is exhausted when all matters pertaining to health and morals are adjusted. By the exercise of this power all business enterprises may be regulated, so as to best secure the general welfare of the people. Thus all charges made by ferrymen, common carriers, hackmen, bakers, wharfingers, hotels, etc., may be regulated by law under a proper exercise of the police power of the state.

Munn vs Illinois, 94 U. S., 113.
Chicago R. R. Co. vs. Iowa, 94 U. S., 155.
Stone vs. Wisconsin, 94 U. S., 181.
People vs. Budd, 117 N. Y., 1.
Reagan vs. Farmers Loan & Trust Co., 154 U. S., 362.

The State may by the same power regulate the hours that women and children may lador in manufacturing establishments, and also to provide for the manner in which they shall be paid.

Commonwealth vs. Hamilton Mfg. Co., 120 Mass., 383.
Shaffer vs. Union Mining Co., 55 Md., 74.

States may also, by the same power, regulate the amount of interest that may be charged.

Cooley's Principles of Constitutional Law, 235.

All laws prohibiting the erection of wooden buildings within certain limits are based upon the same principle.

Whether the statutes in question be tested by definitions or illustrations, they should be conceded to be police regulations; and if constitutional must be held valid, whether deemed by this court to be wise or unwise. A police power can be exercised only by legislative enactment, and it lies solely within the legislative discretion to determine when the public welfare or safety requires its exercise.

Munn vs. Illinois, 94 U. S., 113.

Courts are not authorized to interfere with the exercise of this power except when the act in question conflicts with either the State or Federal Constitution.

Munn vs. People, 69 Ill., 93.
Lake View vs. Rose Hill Cemetery Co., 70 Ill., 192.
Goddard vs. Jacksonville, 15 Ill., 588.
Soon Hing vs. Crowley, 113 U. S., 703, 710.

This court has held that a large measure of discretion "is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests."

Lawton vs. Steele, 152 U. S., 133, 136.
Holden vs. Hardy, 169 U. S., 392.

Is the act of 1889 void because of the provision that it shall not apply to agricultural products or live-stock while in the hands of the producers or raisers? and is the act of 1895 void because of the same exceptions, with the additional one that it shall not be construed so as to prevent the organization of laborers for the purpose of maintaining any standard of wages?

The contention of counsel for appellant is that these provisions make both statutes void. Broadly stated, the contention of appellant's counsel is that the statutes are void because not applicable to all persons and to all classes of property however situated, if found

within the State of Texas. They ignore the doctrine that this court has so well stated,—that a statute need not apply to all persons or all classes of property in order to conform to the Fourteenth Amendment to the Federal Constitution. The language of this court is:

"The Fourteenth Amendment to the Constitution of the United States does not prohibit a law which is limited either in the *objects* to which it is directed, or by the *territory in which it is to operate*. It merely requires that all persons subject to such legislation *shall be treated alike under like circumstances and conditions*, both in privileges conferred and liabilities imposed." (Hays vs. Missouri, 120 U. S., 71.)

To the same effect are the following authorities:

Railway vs. Mathews, 165 U. S., 1.
Holden vs. Hardy, 169 U. S., 366, 380.
Jones vs. Brim, 165 U. S., 180, 181.
State Railway Tax Cases, 92 U. S., 576.
Kentucky Tax Case, 115 U. S., 321.
Pacific Express Company vs. Seibert, 142 U. S., 339.
Natal vs. Louisiana, 139 U. S., 621.
Crowley vs. Christensen, 137 U. S., 86.
Kidd vs. Pearson, 128 U. S., 1.
C., B. & Q. Railway Company vs. Iowa, 94 U. S., 155.
Mugler vs. Kansas, 123 U. S., 623.
Minneapolis & St. L. Railway Co. vs. Beckwith, 129 U. S., 26.
ome Insurance Co. vs. New York, 134 U. S., 594.
Giozza vs. Tiernan, 148 U. S., 660.
Railway Company vs. Macay, 127 U. S., 205.
In re Kemler, 136 U. S., 436.
Railway Company vs. Humes, 115 U. S., 512.
Barbier vs. Connollee, 113 U. S., 27.
Soon Hing vs. Crowley, 113 U. S., 708-9.
Railway Company vs. Gibbes, 142 U. S., 386.
Southerland on Statutory Construction, Secs. 125-6-7.

The power of the legislature to pass laws applicable to certain classes of persons or property only has always been recognized, provided the discriminations made are not arbitrary. The mere fact that a law is not applicable to every class of property and to all persons in every condition does not bring it in conflict with the Fourteenth Amendment. It is upon this principle that statutes fixing

the terms upon which foreign corporations may come within the limits of the State and do business have been maintained.

Pembina Mfg. Co. vs Pennsylvania, 128 U. S., 183.
Payne vs. Virginia, 8 Wall., 168.
Bank vs. Earle, 8 Wall., 168.
Lafayette Ins. Co. vs. French, 18 How., 404.
Ducat vs. Chicago, 10 Wall., 410.
St. Clair vs Cox, 106 U. S., 350.

Statutes regulating liquor dealers, though applicable to no other class of dealers, are valid.

Giozza vs. Tiernan, 148 U. S., 660.
Crowley vs. Christensen, 137 U. S., 86.
Kidd vs. Pearson, 128 U. S., 1.
Mugler vs. Kansas, 123 U. S., 623.
License Tax Cases, 5 Wall., 469.
Crowley vs. Christensen, 137 U. S., 86, 89.

A statute making necessary certain preliminary acts before electric railways can be constructed has been upheld, though in terms not applicable to any other class of railways.

Railway Company vs. Squires, 145 U. S., 175.

A statute which imposes the burden of supporting a railway commission on the railroads alone this court has held valid.

Railway Company vs. Gibbs, 142 U. S., 386.

Legislative enactments providing rules for the assessment of railroad property different from those for the assessment of other property have been upheld.

State Railway Tax Cases, 92 U. S., 576.
Kentucky Tax Cases, 115 U. S., 321, 337.
Bells Gap Railway Co. vs Pennsylvania, 134 U. S., 233, 237.

The same doctrine is announced with reference to other corporations.

Home Insurance Company vs. New York, 134 U. S., 607.
Pacific Express Co. vs. Seibert, 142 U. S., 339, 351.

Graduated inheritance taxes have been upheld.
Magoun vs. Ill. Trust & Savings Bank, 170 U. S., 283, 287.
U. S. vs. Perkins, 163 U. S., 625, 628.
U. S. vs. Fox, 94 U. S., 315, 320.
Mager vs. Grima, 8 How., 490, 493.

The doctrine of these tax cases applies to police regulations as well; different police regulations may be applied to one class of property than those necessary for or applicable to others.

M. & St. L. Ry. Co. vs. Beckwith, 129 U. S., 26.
Mo. Pac. Ry. Co. vs. Humes, 115 U. S., 512.
Railway Company vs. Macay, 127 U. S., 205.

Indeed the whole problem of railway regulation is based upon the proposition that the government has the right to enact rules for their guidance not applicable to any other class of business. The same principle is recognized in what is known as the laundry cases.

Barbior vs. Connollee, 113 U. S., 27.
Soon Hing vs. Crowley, 113 U. S., 709.
Commonwealth vs. Waite, 11 Allen, 264.
State vs. Campbell, 64 N. H., 402.

Statutes requiring separate coaches for colored and white passengers are based upon the same reason.

Railway Company vs. Mississippi, 66 Miss., 662; 1b., 133 U. S., 587.

Supporting this doctrine are the celebrated Granger Cases, decided by this court (94 U. S., 113), as well as Budd vs. New York, 143 U. S., 517. The case last cited involved the New York grain elevator law. And in the case of Brass vs. North Dakota, involving the Dakota elevator law, the same proposition was announced. (153 U. S., 391.)

Laws regulating telephone charges have been upheld, though applicable to no other class of business.

Hockett vs. State, 105 Ind., 250.
Chesapeake Tel. Co. vs. Baltimore Tel. Co., 66 Md., 399.
Central Tel. Co. vs. State, 118 Ind., 194.
St. Louis vs. Bell Tel. Co., 96 Mo., 623, 627.

Statutes fixing telegraph charges have been likewise upheld, though not in terms applicable to any other class of business.

Leavell vs. W. U. Tel. Co., 116 N. C., 211.
State vs. W. U. Tel. Co., 113 N. C., 213.

Statutes regulating tobacco warehouses, though applicable to no other business, have been likewise upheld.

Nash vs. Page, 80 Ky., 539, 545.

Those regulating charges for gas have been upheld, though applicable to no other than gas companies.

State vs. Gas Co., 34 Ohio St., 572.
Zanesville vs. Gas Co., 47 Ohio St., 1.

Statutes regulating water rates, though not regulating the prices of other commodities, have been upheld by this court.

Spring Valley Water Works vs. Schottler, 110 U. S., 347.

Wharfage charges have been the subject of statutory enactments, though the statutes were limited to wharves.

Ouachita Packet Co. vs. Aiken, 121 U. S., 444.

Those regulating ferries and similar establishments have been likewise upheld.

Hudson Co. vs. State, 24 N. J. L., 718.

It was long ago held that the weight of bread may be regulated by statute (Cooley's Constitutional Limitations, p. 744, note 2), yet the weight of other commodities was not so regulated.

A statute prohibiting the transportation of cotton by night within certain counties in Alabama was by the Supreme Court of that State declared to be valid, though applicable to no other class of property.

Mangin vs. State, 76 Ala
Davis vs. State, 68 Ala., 58.

Laws requiring separate schools for white and colored children have been upheld.

Lehew vs. Brummell, 15 S. W., 765.
People vs. Gallagher, 93 N. Y., 438.

Dawson vs. Lee, 83 Ky., 49.
Roberts vs. Boston, 5 Cushing, 198.

Laws requiring barrooms to be kept closed on election days, though permitting all other places of business to be kept open, have been always uniformly upheld.

Laws prohibiting minors from entering barrooms have been likewise upheld, though minors are not prohibited from entering any other place of business, thus discriminating against dealers in liquors.

Counsel for plaintiffs in error relied in the court below, as they doubtless will in this court, on some West Virginia, Illinois and Missouri cases, which seem to deny to the legislature the right to regulate the mining business, and to make reasonable regulations to control the relations of the mining employes and employers. But happily these cases are now brushed aside, and the doctrine has been stated by this court that a legislature may make such regulations as are reasonable for the purpose named.

Holden vs. Hardy, 169 U. S., 366, 380.
Charleston vs. Rodgers, 2 McCord, 496.
Stokes & Gilbert vs. New York, 14 Wendell, 87.
Shaffer vs. Union Mining Co., 55 Md., 74.
Hancock vs. Yaden, 121 Ind., 366.
Jones vs. People, 110 Ill., 590.
Archer vs. James, 2 Best & S., 89.
Daniels vs. Hilgard, 77 Ill., 640.
Litchfield Coal Co. vs. Taylor, 81 Ill., 590.
Commonwealth vs. Bonnell et al., 8 Phila., 534.
Commonwealth vs. Conyngham, 66 Pa. St., 99.
Durant vs. Lexington Coal Mining Co., 97 Mo., 62.

And this may be done by a statute applicable alone to mines.

It will thus be seen that police regulations, like tax statutes, may apply different rules to different persons in different conditions and different classes of property dissimilarly situated, or even to the same kind of property not similarly situated.

The argument of plaintiff in error on this point is based upon a misconception of some of the authorities which they have cited. The decisions to which they call attention are, in the main, based upon entirely dissimilar statutes, and have no relation to the ques-

tion in hand. They cite the case of Dibbrell vs. Morris Heirs, 15 S. W. Rep., 87, 95, but refuse to follow the doctrine which it lays down. In that case the distinguished judge who delivered the opinion said:

"It is believed that an examination of the reported cases will show that none of the legislative classifications of citizens which have been sustained by this court were *arbitrary* in their character. It will also be seen that all of them were made for one or the other of the following purposes, viz: First, for the purpose of taxation; second, for police purposes; third, for the necessary protection of the particular class; fourth, for the release of a class from some particular obligation or liability."

He then proceeded to give examples under each of the classes named, in which legislation in favor of or against a particular class had been recognized as valid, and not only as valid but absolutely necessary. (15 S. W. Rep., 93.) It will be noted that that case suggests that the legislative classifications and discriminations will be sustained unless arbitrary in their character. To the same effect is G., C. & S. F. Ry. Co. vs. Ellis, 165 U. S., 150. The right of classification and exemption as to persons and property from the application of the statute was recognized in that case, though a majority of the court determined that the classifications made in that particular statute were arbitrary.

The cases cited by counsel on this point may be fairly classified as follows:

1. Those which prescribe rules for the collection of debts for one class of persons different from those applicable to all other classes, and which rules are in no sense police regulations.

G., C. & S. F. Ry. Co. v. Ellis, 165 U. S., 150.
Frorer vs. People, 141 Ill., 171.
Braceville Coal Co. vs. People, 147 Ill., 66.
State vs. Goodwell, 33 West Va., 179.
State vs. Coal and Coke Co., 33 W. Va., 188.
Wilder vs. Railway Co., 70 Mich., 382.
Railway Company vs. Williams, 49 Ark., 492.
Jolliffee vs. Brown, 14 Wash. St., 155.
Chair Co. vs. Runnels, 77 Mich., 104.
Railway Company vs. Baty, 6 Neb., 37.

2. Those which undertake to prescribe regulations amounting to a partial prohibition of some one particular business, not in itself contrary to public policy and not injurious to society in any sense,

but on the contrary well nigh indispensable. This class of statutes is illustrated by the one prohibiting bakers, but no others, from baking bread on Sunday, as well as the one prohibiting barbers, but no others, from keeping their places of business open on Sunday.

Ragio vs. State, 6 S. W. Rep., 401.
Ex parte Westerfield, 55 Cal., 550.

3. Those which seek to exempt certain individuals or corporations, naming them, from the operations of the ordinary rules of court procedure, or fixing a different rate of interest which they may charge or receive.

Gordon vs. Building Assn., 12 Bush., 110.
Railroad Company vs. Moss, 60 Miss., 641.
Durkee vs. City of Janesville, 28 Wis., 464, 465.

4. Those which are held void because violating of some limitation imposed by a State Constitution.

State vs. Ragio, 6 S. W. Rep.,401.
Comstock vs. Comstock, 24 Mich., 40.
Baggs Case, 43 Pa. St., 512.

5. Those which seek to make the acts of the agents of one corporation criminal, when they do not embrace all other persons in like conditions, and surrounded by like circumstances.

Budd vs. State, 3 Humph., 483.

6. Statutes which seek to give to some particular class of people the right to circulate libelous matter injurious to society.

Park vs. Free Press, 72 Mich., 560.

7. An act which imposed liability on railroad companies for damages without giving them the right of judicial ascertainment.

Railway Company vs. Morris, 65 Ala., 194.

But the distinctions between the cases cited by counsel for plaintiffs in error and in this case have been well pointed out by this court in the case of Holden vs. Hardy, 169 U. S., 366, 380. As a result of all of these cases, we respectfully submit that it is well settled that a statute is not void because not applicable to all persons and all property, but that it is valid provided it applies to all persons or all property similarly situated. Unless it can be shown,

therefore, that the persons and property exempted from the operation of these laws are "under like circumstances and conditions" with those brought within their operation, the contention of plaintiffs in error cannot be maintained. It is immaterial whether the statute in specific terms applies only to certain persons or certain classes of property, or whether it is broad enough to include all persons and all classes of property and is made inapplicable to those that are exempted from its operation by an exception or proviso.

An analysis of the statutes under discussion will clearly demonstrate that they fairly include, and were intended to include, all dealers, miners and manufacturers who control the output of the factories and mines and the prices of the products that are sold to consumers. The statute may, therefore, fairly be construed as applicable to this class of cases, the exceptions excluding from the operation of the statutes the products while in the hands of those who produce them, and live stock while in the hands of those who raise it, simply eliminates all except the dealers in those commodities, the miners and manufacturers. It is not believed that anyone would question the right of the Texas Legislature to make a statute applicable only to manufacturers, miners and dealers in the prime necessities of life. But suppose such a statute had been passed. Products while in the hands of the farmer or planter, and live stock in the hands of the raiser, would be exempt from its operation. What difference can it make that the statute in broad and explicit terms included all persons and all property within its purview, and then by a proviso or exception eliminates the character of property and the character of persons to whom it is not designed to apply? The effect or result of the statute must be noted, rather than the particular phraseology in which the effect or result may be produced. It is well settled that before a statute can be declared void because not applicable to all persons or all property it must be shown that the classifications or discriminations under the statute are arbitrary or capricious. In other words, it must be shown that no sufficient reason for the classification exists. To illustrate: The statutes regulating freight and passenger rates on railroads, whether by a direct exercise of the legislative power or through a railroad commission, are inapplicable to any other carriers than railroads. For example, the statutes of Illinois, Minnesota, Iowa, Texas and Georgia, which seek to give the Railroad Commissions

the power to fix freight and passenger rates on railroads, do not clothe the commissions with the power to fix freight and passenger rates on public carriages, hacks, and stage coaches, nor for wagoners who may be common carriers. Yet hackmen, carriage owners, stage owners and wagoners are as much common carriers as railroad companies are. But it has never occurred to anyone to challenge the validity of these laws for that reason, because it seemed to be admitted that the conditions and circumstances surrounding the railroad transportation, and the reasons for its regulation were so dissimilar from those surrounding other common carriers as to render the regulations applicable to one wholly unnecessary and inapplicable to the other. While the statutes in question exempt agricultural products and live stock in the hands of the producer, or raiser from their operation, the question is, is there any reason why they should have been made applicable to those commodities while in the hands of the raiser or producer? Are the conditions surrounding the agricultural products and live stock while in the hands of those who produce the one or raise the other such as to require the same regulations as are necessary to be had after these commodities shall have passed into the hands of dealers? Suppose it should be found by the Legislature, in the exercise of a proper and wise discretion, that the raisers of live stock and the producers of farm products are unable to form any combinations or agreements in restraint of trade which would be able to control prices or destroy or affect competition. Is there any reason why the Legislature should be called upon to pass a law prohibiting that which cannot be done in order that they might prohibit that class of agreements which can be made effective, and which are harmful to society? Upon the plaintiff's in error in this case rests the burden of proving that the conditions surrounding these classes of property while in the hands of the raiser or producer are such as to require substantially the same regulations for the protection of society that become necessary when it passes into the hands of the dealers. Unless that can be shown they have no right to challenge the constitutionality of these statutes because they are in no position so to do. It is an elementary principle that every statute must be held valid until the contrary is made to appear beyond a reasonable doubt.

Hennington vs. Georgia, 163 U. S., 304.
Powell vs. Pennsylvania, 127 U. S., 684.

State vs. Laughlin, 75 Mo., 147.

State vs. Addington, 77 Mo., 110, 118.

In as much as counsel for plaintiff's in error insist that these statutes are void because of the exceptions, they must prove to this court from the record or from facts within the judicial knowledge of this court, beyond a reasonable doubt, that the classifications in the statutes are erroneous and that the property excluded from their operation should have been included within them. If they do less than this they cannot show to this court that the exceptions were arbitrarily made, and that no reason for their existence can be found. This court has held that if there is one construction or one hypothesis which is reasonable that would uphold a statute, then that construction or that hypothesis should be adopted, even though another be more natural or probable.

U. S. vs. Central Pacific Ry. Co., 118 U. S., 235, 240.

Broughton vs. Pensacola, 93 U. S., 266.

Red Rock vs. Henry, 106 U. S., 599.

Hobbs vs. McLean, 117 U. S., 567.

U. S. vs. Coombes, 12 Pet., 72.

Ogden vs. Saunders, 12 Wheat., 270.

Grenada Co. vs. Brogden, 112 U. S., 261.

23 Amer. & Eng. Ency. of Law, Subd. 2, p. 349, and authorities there cited.

Plaintiffs in error have not discharged the burden which devolved upon them of showing that the discriminations in these statutes are arbitrary.

They have not shown that the same regulations are necessary in dealing with this property while in the hands of the raiser or producer as may be after it passes into the hands of the dealers. They have, therefore, failed to show that the statutes are unconstitutional. They cannot be heard to say that by showing a discrimination or a classification that they have shifted the burden of proof on the defendant in error. The burden never shifts from him who attacks the constitutionality of the statute. It has never been held that a statute which discriminates in favor of or against a class of citizens or property, or fixes different rules for different classes of persons or property under different conditions, is invalid. When a person shows that a statute discriminates, he has proven only half of his case. He must follow it up by showing that the discrimination

is arbitrary and unreasonable. But in this case plaintiffs in error have contented themselves with showing that there is a discrimination, and have left this court to presume that it is arbitrary.

Courts will not indulge in any presumptions against the validity of this statute. A distinguished text-writer has said: "The legislature and judiciary are co-ordinate departments of the government; * * * and it is only when the courts find that the legislature has failed to keep within its constitutional limits that they are at liberty to disregard its action." Cooley's Const. Lim., Secs. 192-3. To find that the legislature has not kept within its constitutional limits in this case, this court must find that the statute discriminates, and that it discriminates without reason, and that must appear beyond a reasonable doubt.

A court will not declare a statute unconstitutional and void solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social or political rights of the citizens, unless it can be shown that such injustice is prohibited or such rights guaranteed or protected by the Constitution.

Cooley's Const. Lim.,6 Ed., p. 197.
Wellington, Petitioner, 16 Pick., 87-96.

If the rule were otherwise, the government would be such as arbitrary discretion of its judges might suggest, and would differ as often as courts differ. In the language of this court:

"There are undoubtedly fundamental principles of morality and justice which no legislature is at liberty to disregard. But it is equally undoubted that no court, except in the clearest cases, can properly impute the disregard of those principles to the legislature. * * * This court can know nothing of public policy except from the Constitution and laws, and the course of administration and decision. It has no legislative powers. It cannot amend or modify any legislative acts. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must, in general, be addressed to the legislature. Questions of policy determined there are concluded here." (License Tax Cases, 5 Wall., 469.)

All mere questions of expediency and all questions in respect to the just operation of the law within the limits prescribed by the Constitution were settled by the legislature.

Perry vs. Keene, 56 N. H., 530.
People vs. Fisher, 24 Wend., 215-20.
State vs. Staten, 6 Cold., 238.
Walker vs. Cincinnati, 21 O. St., 14.
State vs. Smith, 44 O. St., 348.

The cases last above cited show that courts cannot set aside an act under the impression that they have discovered something in the spirit of the Constitution which is not even mentioned in the instrument. It is held that nothing but express constitutional limitations can control the action of the legislature.

Cooley's Const. Lim., 6 Ed., 204-5.
Cochran vs. Van Surlay, 20 Wend., 365, 381-3.
This express conflict must be capable of being pointed out.
People vs. New York Central R. R. Co., 34 Barb., 123.
Gentry vs. Griffith, 27 Texas, 461.

Has the conflict in this case been pointed out? The fact that the Texas legislature can pass no valid law in conflict with the Fourteenth Amendment to the Federal Constitution is admitted. But does this law conflict with the Fourteenth Amendment? The burden being upon the plaintiffs in error to point out the conflict, has that burden been discharged? If so, how? Have not counsel contented themselves with showing that the statutes do not apply to all persons and all property? In other words, that they discriminate or exempt property from their operation under certain conditions. Is there anything new in that? Do not police regulations which are applicable alone to railroad companies exempt all other property from their operation? Do not the statutes and ordinances regulating the laundry business exempt all other kinds of business from their operation? Are not the regulations of the liquor traffic applicable alone to that class of business? Are not the statutes prohibiting the playing of cards in public places and exempting other games from their operation in the same sense discriminative? Are not the laws which compel liquor dealers to close their houses on election days and permit other merchants to keep theirs open discriminative? Are not the probate laws of the various States which allow certain classes of claims to be preferred over others discriminative? Indeed, is not the greater part of the legislation of all the States discriminative in the sense that it applies to special objects only to the exclusion of others? It cannot in fairness be stated that these statutes under discussion are void simply because they are not applicable to all classes of persons and property, without reference to the circumstances and conditions surrounding those excepted from their operation. If they be void for that reason, then all the legislation above mentioned is likewise void. Counsel for ap-

pellant must go further than to say that there are discriminations. They must show that they are unjust or unreasonable discriminations—that they are arbitrary.

It has been heretofore stated that the burden is on the plaintiffs in error to show that the conditions that surround these classes of property while in the hands of the producer or raiser are such as to require for the protection of society the same police regulations that become necessary after the property passes into the hands of the dealer. They have not discharged this burden which they voluntarily assumed. They seem to insist that the burden is upon the State to show that this classification is fair, and that there is some reason to support it. The burden is not on the State, but it might safely be assumed in this case; and in so doing it would not be necessary to ask the court to announce any new doctrine or to take any position inconsistent with the well settled rules of construction. The first thing to ascertain in the construction of the statute is, what evil did the Legislature seek to prevent? What evils were there in existence which needed to be remedied? The Supreme Court of Texas in a well considered opinion have undertaken to answer this question. The laws in question are denominated anti-trust laws. That court in discussing the Act of 1889, said:

"Its title is 'An Act to prevent trusts, and to provide for penalties and punishments of corporations, persons, firms and associations of persons connected with them, and to promote free competition in the State of Texas.'"

The title of the Act of 1895 is almost identical with that of the one above quoted. (Record, p. 24.) What the Supreme Court of Texas has said, then, in reference to the Act of 1889 may well be applied to the Act of 1895. Discussing the Act of 1889, it said:

"The term 'trust' is not here employed in a technical sense. By very recent commercial usage this meaning of the word has been so extended as to comprehend combinations of corporations or capitalists for the purpose of controlling the price of articles of prime necessity, or the charges of transportation for the public. The formation of gigantic combinations for these purposes in late years has created alarm and excited the liveliest interest in the public mind. The amount of discussion which it has invoked, considering the time during which it has progressed, is probably without parallel. See 2 Beach on Priv. Corp., Sec. 856, and notes. In the year 1888 the discussion seems to have become general, and in 1889 many Legislatures, including our own, made laws for the purpose of punishing and repressing such conspiracies. 2 Beach on Priv. Corp., 1351, note 2.

"Notable instances of these combinations were that of manufacturing corporations engaged in refining sugar, which was declared illegal by the Court of Appeals of New York in the case of the People vs. North River Sugar Refining Company, 121 New York, 581; that of the 'Cotton Seed Oil Trust' (The

State vs. Cotton Seed Oil Trust, 40 Louisiana Annual, 8); that of the 'Diamond Match Trust' (Richardson vs. Buhl, 6 Law Reporter Annual, 457); that of the 'Chicago Gas Trust' (The People vs. Chicago Gas Trust, 130 Illinois, 268); that of the 'Standard Oil Trust' (Rice vs. Rockefeller, 8 Railway & Corporation Law Journal, 886); and that of the 'Alcohol Trust' (The State vs. Nebraska Distilling Company, 8 Railway & Corporation Law Journal, 323). For other cases of like character, see Morris Run Coal Company vs. Barclay Coal Company, 68 Pa. St., 173; Arnpt vs. Coal Co., 68 N. Y., 558; Santa Clara V. M. & L. Co. vs. Hays, 76 Cal., 387; Clancy vs. Onondega Salt Co., 62 Barb., 395; Craft vs. McConnoughy, 79 Ill., 346; India Bagging Co. vs. Kock, 14 La. Annl., 168; Gibbs vs. Baltimore Gas Co., 130 U. S., 396; Texas Oil Co. vs. Adoue, 83 Texas, 650; and Anderson vs. Jett, 89 Ky., 375.

"*The instances of combinations shown by the cases cited serve to illustrate the causes of popular discontent, and the evils which the Legislatures of the several States sought to remedy by direct statutory enactments upon the subject.* They were combinations organized for the purpose of affecting the prices of articles of prime importance in commerce or the rates of transportation and intercommunication. The evils resulting from these operations were doubtless paramount in the minds of the legislators when they passed the statute under consideration; *and it was to repress these practices that the law was enacted.* By 'the plain import of its language' it makes unlawful all combinations to raise or depress the price of all articles of commerce whatever, or to increase or diminish the rates of transportation of such articles." (Ins. Co. vs. State, 86 Texas, 250, 266.

Are not the reasons above stated conclusive on this court? Is not the construction of the Supreme Court of Texas conclusive on the question of this *intention* of the Legislature?

The Supreme Court of the State have determined that the purpose of the Legislature in passing the act—the legislative intent, if you please—was to prevent combinations of capitalists and corporations from controlling the price of products of prime necessity, and to prevent the formation of gigantic combinations for this purpose. The Legislature had in its mind but this one point, and that was to prevent combinations of capital for the purposes stated—that is, the control of prices and the destruction of competition. It is reasonable to suppose that the Legislature would not want to do more than to accomplish that purpose. The Supreme Court of Texas in the opinion stated, has said that in 1888 the discussion seemed to have become general, and in 1889 many legislatures, including that of Texas, made laws for the purpose of punishing and suppressing such conspiracies. That learned court cited authorities to show the extent of this discussion, not on the hustings but in the courts of last resort in almost every State in the Union, and in this

high court as well. To these might have been well added the investigations made by the various legislatures and by Congress. These cases thus cited may be examined in vain to find a single instance where the raisers of live stock or the producers of agricultural products were charged with having made any combinations for either of the purposes stated—the controlling of prices or the destruction of competition. If they had ever attempted such a combination the attempt was so weak as to have excited no comment There was, therefore, no reason why the Legislature should undertake to prevent combinations of a class of people who had never up to that time been able to control the prices of a single commodity raised or produced by them, when there was no probability that they would ever be able so to do. As before stated, the Legislature sought to deal with manufacturers, miners and dealers in the prime necessities of life. It sought to prevent the combinations of manufacturers, miners and dealers which would affect the prices of the various articles necessary to human existence. In order to accomplish that purpose counsel for the plaintiffs in error insist that all combinations between the raisers of live stock or the growers of farm products should have been likewise prohibited, though combinations between those classes last named would not be hurtful to society. In other words, they announce the proposition that in order to prevent that which is hurtful, acts which are innocent must also be prohibited. In order to prohibit combinations that will be injurious to society, the Legislature must prohibit those combinations which are not injurious to society. On the same principle the laws regulating railroad freight and passenger rates must be held invalid for the reason that they do not undertake to regulate the charges made by other common carriers. Yet, as before pointed out, no railroad legislation has heretofore attempted to regulate other carriers, unless it be express companies. Why? Because the injuries inflicted by those carriers other than railroads were so slight as not to be appreciable, and, therefore, no reason could be found why they should be regulated in order to make valid regulations as to railroads. So it is here insisted that a statute which seeks to deal with manufacturers, miners and dealers in commodi-

ties need not include within its terms producers or raisers because the harm that is done by the producer or raiser of live stock, if harmful at all, is so trivial and unimportant to society at large that it is not necessary to include them within the terms of the statute. That was the view of the Court of Civil Appeals of Texas, whose decision this court is asked to review. That learned court said:

"Whatever conditions may exist elsewhere concerning the conduct of the producing class in effecting through combinations the price of their products, it cannot be said to exist in this State, if at all, to any appreciable extent; at least not to such an extent as to be an evil of such proportions as to necessarily require corrective measures for its suppression. All these facts were known to the Legislature, and evidently influenced them in selecting the subjects to which the law should be applied. (Plessy vs. Ferguson, 163 U. S., 550). And, as said in Railway Company vs. Macay, supra, it was simply a matter of legislative discretion whether the same liabilities should be applied to the classes which were exempted from the operation of the statute. * * * The conditions of the classes embraced in the act and those excluded are not altogether similar, and there are many distinguishing features between the two which suggest a power in the one to successfully combine, and which deny it to the other." (Record, pp. 175-6.)

We understand it to be well settled that the finding of the State court on a question of fact is conclusive on this court. (Egan vs. Hart, 165 U. S., 188, and authorities there cited.) It must follow that the findings of the Court of Civil Appeals that the conditions existing in Texas were such that the farmers and stock raisers of Texas had never been able to injuriously affect the price of commodities nor competition, and that therefore there was no necessity of any legislative correction of them is conclusive on this court. If this view obtains it will dispose of this question. Certainly this view ought to obtain unless the members of this court can say that they judicially know that the findings of fact made by the Court of Civil Appeals upon this question are erroneous.

We submit that the decision of the Supreme Court of Texas in which they state the evils sought to be remedied by this legislation, and the statements of the Court of Civil Appeals as to the reasons for the exemption, are not unsupported by the decision of this court in the case of the United States vs. Trans-Missouri Freight Association (164 U. S., 389). There is nothing in the record of this case to indicate that the findings of the Court of Civil Appeals on the facts are wrong. Besides, this court must take judicial cognizance of the fact that there has never been in the Union any complaint that the farmers and stockraisers had ever succeeded in controlling, or that they were likely to be able to control the prices of

the prime necessities of life. In the sugar trust case it was not hinted that the producers of sugar had been able to fix the price, but it was the refiners of sugar. In the Standard Oil case it was not the producers of the raw petroleum, but it was the refiners that had gotten control of the market through large combinations of capital. The recent combinations in the price of grain were not made by the farmers of the great northwest, but by the dealers in Chicago. Indeed, the dealers in the prime necessites of life have always controlled the markets, the producers having had practically no voice in it. Take any commodity—cotton for example; the dealers control the price. Take wheat; the dealer controls the price, and has been able to raise or lower it at his pleasure—the producers are powerless. Take meat; the raisers of the live stock cannot control their prices, but it is the packing houses that control the price of the product after the live stock is slaughtered. With these well known facts, why should it be said that the Texas Legislature—not only the Texas Legislature but the Legislatures of all other States—must prohibit the harmless agreements between stock raisers and between farmers in order to be able to prohibit the injurious agreements thus hurtful to society made by dealers, manufacturers and miners? It is well konwn that the consumers do not purchase the commodities necessary to their existence directly from the producers. The farmers and stock raisers sell their products and their live stock to dealers, and the dealers sell to the consumers. If the market gardeners around Chicago should undertake to control the prices of a given product, with the railroad and express facilities which we now have the market gardeners of the entire United States would become thier competitors, and unless the combinations were made between market gardeners everywhere, those immediately adjacent to any particular city could not control the market in that city. Strawberries are sent from Texas to St. Louis. Fruit and berries are sent from San Francisco to Chicago. Vegetables are sent from Mississippi and Michigan to every part of the United States by market gardeners, and unless the combination becomes complete between all of them throughout the Union, which is improbable—if possible—they cannot control the price of a single product. It may still be asked, if they are powerless to control, why did not the Legislature include them within the terms of the statute? The answer to that is that the

question is immaterial. It is a matter purely within the legislative discretion, and the only question pertinent to the issue is whether the law bears equally upon all persons and property similarly situated, and if it be shown that the producers and raisers are not similarly situated in respect to these particular statutes, the only question is whether the Legislature had a right to do what they did, and not as to why they did it. The Legislature within its constitutional limitations is like the individual within his. Any citizen may perform an act the wisdom of which is not apparent, or the necessity for which is not recognized. But if he has a right under the law to perform that act, neither courts nor citizens have any right to institute any inquiry in respect thereto. So it is with the Legislature. The Legislature acting within its constitutional authority has a right to pass any law it pleases, so long as that law does not take from any citizen a right guaranteed to him by either the State or Federal Constitution; and those whose duty it is to enforce the laws passed by the Legislature are not compelled to give any reason why the Legislature passed it, but those who attack the work of a legislature, must show that the legislature did not have the power to pass the law of which complaint is made.

Adverting again to the decision of the Texas courts, I beg to suggest, with all due deference to this court, that great weight should be given to a decision of a State court on questions of this character—greater, indeed, than on any other question. The members of this court are wisely taken from all parts of the Union. I presume that I am not putting it too strongly when I say that it is impossible for any one member of this court to be familar with all of the local conditions in every state in the Union. They are presumed to know many things that it is impossible for any one man to learn. I heard a learned judge on one occasion say, during the progress of an argument, that he was presumed to know the geography of every foot of this country, but that he was utterly ignorant of the geography of the particular territory then in question. I apprehend the members of this court are somewhat similarly situated. The members of the Texas bar engaged in this case would not be, I take it, sufficiently familiar with local conditions in New York, Chicago and San Francisco as to be able to determine what police regulations were necessary in those several cities. It is true that some of them might be so absurd that on their face we would

say they were unjust, capricious, and adopted without reason. Others we would at once determine were wise and salutary, or at least within legislative discretion. But there must be many regulations the wisdom of which depends upon the particular conditions in those cities to which they are sought to be applied, and our want of knowledge of those conditions might render it impossible for us to tell whether they are wise or unwise. But if the courts of those States, familiar with the conditions upon which they are called to pass, the existence of which would determine whether the Legislature had the power to pass the particular regulations or not, were to hold after repeated arguments from those who are interested that the conditions existed which justified the regulations, I apprehend that counsel in this case would undoubtedly say that the courts were the best judges of the local conditions there, and that the legislature had the power to pass the laws in question. So I apprehend that it must be with this court in dealing with the legislation of the various States. Many of the laws of which complaints are made are palpably wrong, possibly in plain violation of the Federal Constitution. Others are clearly right and necessary. Then there must be a large class of laws brought here for review, the validity of which, like the ones in question, must depend upon the conditions in the particular localities in which they are to be applied. If there is anything in the record in the particular case to indicate that the conditions did not justify the laws, then this court can set them aside. If this court judicially knows that there were no facts or conditions upon which the classification could be justly based they should be set aside. If there is nothing in the record, and nothing judicially known to the court, to prove that they are unreasonable or capricious, then I apprehend that if the courts of that State upheld them that this court will not declare them invalid.

The Courts of Civil Appeals have upheld these classifications in this case, based on the reasons above indicated—that the difference in the conditions and circumstances surrounding the property while in the hands of the producers or raisers and those surrounding it while in the hands of dealers, justifies the discriminations or classifications made. The Supreme Court of the State, doubtless for a similar reason, refused a writ of error in this case, and overruled a motion for a rehearing. (R., pp. 207, 211.)

Insurance Co. vs. State, 86 Texas, 250.

Houk & Dieter vs. Brewing Association, 88 Texas, 184, 189.
Coal Company vs. Lawson, 34 S. W. Rep., 919.
Brewing Company vs. Templeman, 38 S. W. Rep., 27.
Fuqua vs. Pabst Brewing Co., 38 S. W. Rep., 30.
Gates vs. Hooper, 90 Texas, 563.

In this connection it is proper to add that the statement in the brief of plaintiff in error to the effect that the Supreme Court had recognized this classification as just in cases decided before the decision by this court of the case of G. C. & S. Ry. Co. vs. Ellis, (165 U. S.) is inaccurate, if counsel mean to be understood as saying that the Supreme Court have not decided that point since the decision of the Ellis case. The record of this case shows that the writ of error was refused on the 5th day of May, 1898, and the motion for rehearing therein overruled on the 26th day of May, 1898, which shows the error involved in that statement.

What has been said in reference to agreements between farmers and stockraisers is likewise true of laborers who seek to maintain a given standard of wages. We have never heard of agreements between laborers to insist on a given standard of wages having been held or believed to be contrary to public policy. In this connection it is necessary to discriminate between agreements to maintain a living standard of wages, and in the unlawful means sometimes adopted to enforce such agreements. The agreement and the means used to enforce it must be kept distinct. The agreement may be lawful, and yet unlawful means adopted to enforce it. I have never heard anyone complain that laborers did not have the inherent right to agree that they would not work unless they could obtain a given standard of wages; but the complaint arises when they undertake to COMPEL others to accept their agreements—when they attempt to prevent others from working for lower wages. Railroad laborers may strike, others may strike, because they think their wages inadequate. I understand it to be conceded that they have a right to do this. They have a right to agree—at least it does not injure society for them to agree—that they will not work unless they are paid a reasonable amount. But if some other laborers undertake to work and those who have made this agreement seek by force or threats to prevent their doing so, it is that that is condemned—the forcible interference with the rights of others, not the agreements. Why? Because if laborers may quit any work in which they are en-

gaged, their places can be filled in a few days; and if when new labor comes in they abstain from violence, the machinery moves on as before. It is the violence that is to be condemned, not the agreement. It is the violence that is injurious to the public, not the mere act of agreeing to quit work. It is perfectly lawful for one man to agree to give his neighbor possession of a house or farm on a given date. But if his neighbor undertakes to enforce that agreement by unlawful means, the means of enforcing it are condemned, but the agreement itself is upheld. An agreement to pay money to a creditor on a given date is a lawful agreement, but if that creditor undertakes by unlawful means to compel the payment of that money on that date, or any date subsequent thereto, his agreement to require the payment is lawful, but the means to which he resorts to enforce it are condemned.

Thus distinguishing between the agreement itself and the means used to enforce it, the statute of 1895 is valid, and everything said in reference to the statute of 1889 is applicable to it.

But the Act of 1895 becomes immaterial in this connection; because if it be invalid for the reason that it permits contracts to be made by laborers to maintain a standard of wages, and for that reason only, it leaves the Act of 1889 in full force and effect. The Act of 1889 is not expressly repealed—it is repealed only in so far as it conflicts with the Act of 1895. If the Act of 1895 is void, there is nothing with which the Act of 1889 conflicts—in other words, a void act repeals nothing.

We have thus discussed the question of the reasonableness of these discriminations. We have endeavored to present our views of the case by insisting on the following propositions:

1. That the burden of proof is upon the plaintiffs in error to show beyond a reasonable doubt that these statutes are invalid because the discriminations or classifications of which complaint is made were arbitrary and capricious.

2. That that burden had not been discharged by them, because there is no fact in the record, nor nothing judicially known to this court, which would justify the contention made by plaintiffs in error.

3. That the statutes substantially apply to dealers, manufacturers and miners, and exclude from their operation only the raisers of live stock and the producers of agricultural products, in so far as they deal with those commodities raised by them. But that when

they deal in commodities other than those they have raised they become dealers, and the law applies to them, and therefore applies to all persons similarly situated.

4. That there is no necessity for the prohibition of agreements between the raisers of live stock and the growers of agricultural products, for the reason that they are powerless to control the prices of their products, if they so desired, and in as much as they are powerless to do any injury these statutes cannot be invalid, because the Legislature did not likewise seek to prevent contracts that were harmless to society.

5. That no complaints have ever been made in the many legislative, congessional and judicial investigations that farmers and stock raisers have sought to control the prices of their products, and that, therefore, it should be conclusively presumed by this court that no effective combinations of that kind had been made, or complaint of their existence would have been heard.

6. That the fact that the Act of 1895 does not prohibit contracts between laborers to maintain a standard of wages does not render that act void, because such acts are not contrary to public policy, and have never hurt society—distinguishing in this connection contracts between laborers and the unlawful means sometimes used to enforce them.

7. That the decision as to the validity of the Act of 1895 is immaterial in this case, because if it be held invalid on account of the additional exception above mentioned, still the Act of 1889 will remain, and will prohibit the class of agreements which were shown to have been made in this case.

We have laid great stress on the decisions of the Texas courts as to the reasonableness of these discriminations, but we do not wish to be understood that this court should abdicate its high position, or relinquish its prerogative of determining the questions involved in this case out of deference to the Texas courts, except on the ground stated that this court is concluded by the findings of fact made by that court. But if this court does not accept that view then we insist that the decision of these State courts, the correctness of which must depend upon local conditions, should be given greater weight by this court; that this court ought to defer to those courts on questions of this kind rather than on the decision of questions which do not depend upon an accurate knowledge of local condi-

tions. And in this connection we beg to suggest that the decisions of the Texas courts have not been capricious in any sense. They have followed, and are now following, the settled policy of that State in holding the discriminations reasonable. It cannot be suggested by even the most malevolent that the Texas courts have undertaken to heed the impulses of the mob. Because the history of that State will acquit them of any such suggestion. In order to make that clear we beg again to recur to the distinction between police regulations and taxing laws. They are very close akin. It is difficult to determine whether an occupation tax is a police regulation or whether it is a revenue measure. It is believed that the distinction depends upon the purpose of the Legislature in passing the occupation tax law. If its purpose was to raise a revenue it is a revenue measure. If its purpose was to regulate the business, with revenue as a mere incident, it is a police regulation. (Cooley on Taxation, 1st Ed., Chap. 19, pp. 396-7.) But in any event the taxing power and the police power of a State must be exercised alike in conformity with the Fourteenth Amendment to the Federal Constitution. Arbitrary discriminations must not be made in either instance; but the taxing power and police power may be varied to suit the different subjects to which they are sought to be applied. Taxes must be equal and uniform upon all classes of property similarly situated.

Police regulations must be applicable to all persons and property similarly situated. They need not apply to all property dissimilarly situated. For instance, railroad regulations may not apply to any other kind of property. Statutes and ordinances regulating laundries need not regulate the drug business. The same may be said of tax laws. Tax laws that are just to railroad companies, telegraph companies and express companies may be unjust to the holders of other property. Hence different rules may be applied to these different classes of property. Bearing in mind that revenue laws and police regulations must be reasonable and not capricious in their discriminations, it will be interesting to note some of the revenue laws of Texas which have existed ever since that State became a part of the American Union.

It was admitted into the Union under what is known as the Constitution of 1845, which contains, among others, the following provision: Art. VII, Sec. 27:

"Taxation shall be equal and uniform throughout the State. All property in this State shall be taxed in proportion to its value, to be ascertained as directed by law, except such property as two-thirds of both houses of the Legislature may think proper to exempt from taxation. The Legislature shall have power to lay an income tax, and to tax all persons pursuing any occupation, trade or profession; *provided, that the term occupation shall not be construed to apply to pursuits either agricultural or mechanical.*" (Sayles' Texas Statutes, Vol. 4, p. 211.)

In 1861 Texas undertook to secede. The convention declaring for secession amended the Constitution of 1845 so as to conform to the new conditions, but Art. VII, Sec. 27, was preserved and made to read as follows:

"Section 27. Taxation shall be equal and uniform throughout the State. All property in this State shall be taxed in proportion to its value to be ascertained as directed by law, except such property as two-thirds of both houses of the Legislature may think proper to exempt from taxation. The Legislature shall have power to lay an income tax and to tax all persons pursuing any occupation, trade or profession; *provided, that the term occupation shall not be construed to apply to pursuits either agricultural or mechanical.*" (Sayles' Texas Statutes, Vol. 4, p. 247.)

In 1866 another Constitution was formed under what is known as President Johnson's policy. Article VII, Sec. 27, of that instrument reads as follows:

"Taxation shall be equal and uniform throughout the State. All property in this State shall be taxed in proportion to its value to be ascertained as directed by law, except such property as two-thirds of both houses of the Legislature may think proper to exempt from taxation. The Legislature shall have power to lay an income tax and to tax all persons pursuing any occupation, trade or profession; *provided, that the term 'occupation' shall not be construed to apply to pursuits either agricultural or mechanical.*" (Sayles' Texas Statutes, Vol. 4, page 322.)

In 1869, what is known as the Reconstruction Constitution of Texas, was adopted. Section 19, Art. XII, of that instrument reads as follows:

"Taxation shall be equal and uniform throughout the State. All

property in the State shall be taxed in proportion to its value to be ascertained as directed by law, except such property as two-thirds of both houses of the Legislature may think proper to exempt from taxation. The Legislature shall have power to lay an income tax and to tax all persons pursuing any occupation, trade or profession *provided, that the term 'occupation' shall not be construed to apply to pursuits either agricultural or mechanical.*" (Sayles' Texas Statutes, Vol. 4, p. 461.)

When the democratic party regained power in Texas, it made a new Constitution, which was adopted in 1876, and is known as the Constitution of 1876. Section 1, Article VIII, of that instrument so far as applicable, reads as follows:

"Taxation shall be equal and uniform All property in this State whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law. The Legislature may impose a poll tax. It may also impose occupation taxes, both upon natural persons and upon corporations, other than municipal, doing any business in this State. It may also tax incomes of both natural persons and corporations, other than municipal, *except that persons engaged in mechanical and agricultural pursuits shall never be required to pay an occupation tax;* provided, that two hundred and fifty dollars worth of household and kitchen furniture, belonging to each family in this State, shall be exempt from taxation." (Sayles' Texas Statutes, Vol. 4, bottom of page 557 and top of page 558.)

It will thus be seen that no matter which party framed the State Constitution, whether the revolutionists who won Texas' independence, the democratic party, the secessionists in 1861, the republicans in 1869, or the democrats in 1876, in each Constitution it was declared without reference to party distinctions that all natural persons and corporations other than municipal corporations, *except persons engaged in agricultural and mechanical pursuits,* should be subject to an occupation tax. Texas had some reason in so doing—it was not a capricious discrimination in favor of agriculturists and mechanics, but the conditions were such as to justify it. I

seems that this must conclusively appear, because if this was an improper classification, surely the democrats, republicans, secessionists and all other classes would not have in each Constitution made the same discrimination. The occupation tax laws of Texas have been uniformly held valid. It has not even occurred to anyone to question their validity on account of these discriminations.

Giozza vs. Tiernan, 148 U. S., 660.
Higgins vs. Rinker, 47 Texas, 383, 395.
Harris vs. State, 4 Tex. App., 131.
Tonella vs. State, 4 Tex. App., 325.
Languille vs. State, 4 Tex. App., 312.
Ex Parte Cooper, 3 Tex. App., 489.
Ex Parte Mabry, 5 Tex. App., 93.
Albrecht vs. State, 8 Tex. App., 216.

In the last mentioned case the opinion of the court was delivered by Judge Clark. That portion of his opinion bearing upon this subject reads as follows:

"The class of subjects proposed to be taxed were retail dealers in spirituous, vinous or malt liquors, and the provisions of the law are made to apply to all such dealers within the limits of the authority levying the tax. That more money may be collected from one dealer than another does not destroy the equality or uniformity of the system, within the meaning of the Constitution, but the tendency and effect is decidedly to the contrary. 'Perfect equality and uniform taxation will remain an unattainable good as long as laws and government and man are imperfect.' Approximation to this is all that can be had, and this is remitted to the patriotic judgment of the law making power. Whether a tax is just and equal or not, is not a question of law. If it were, courts, by adopting a standard of rigid construction, might altogether put a stop to taxation; for no system ever devised, whether it related to a tax on property or on business, or a capitation tax, ever in its practical operations bore equally and uniformly on the same class of subjects. If there is such equality and uniformity as conforms to the standard provided in the Constitution, or reasonably deducible from it, it is all that can be required. Texas Banking and Insurance Company v. State, 42 Texas, 639; Youngblood v. Sexton, 32 Mich., 414; Cooley on Taxation, 124-127. Viewed in its twofold aspect, the law in question is free from objection on this account." Albrecht v. State, 8 App., 228.

Paraphrasing this opinion quoted, it can be made to read as follows: Perfect equality and uniformity in police regulations will remain unattainable as long as laws and men and government are imperfect. Approximation to these is all that can be had, and this is remitted to the patriotic judgment of the law making power. Whether a police regulation is just and equitable or not is not a question of law. If it were courts by adopting a standard of rigid

construction might altogether put a stop to police regulations, for no system ever devised, whether it related to the regulation of property or of business or of persons, ever in its practical operation operated equally and uniformally on the same class of its subjects. But such equality and uniformity as conforms to the standard provided in the Constitution and reasonably deducible from it is all that can be required.

It ought, therefore, to be held that absolute equality in police regulations is impossible. No police regulation can be made absolutely fair and just if it applies to more than one class of property. Humanity is imperfect. Its work[illegible] must be imperfect. No finite mind can grasp all of the conditions and analyze all of the circumstances and in all instances reach a correct conclusion as to what is wisest or best to be prohibited or permitted. Approximation to the right is all that can be had, and, as declared by the Court of Criminal Appeals of Texas, the question at last is remitted to the patriotic judgment of the law making power. Courts ought not to adopt a standard of rigid construction which would practically put a stop to police regulations, but let humanity, in its efforts to control the offending elements of society, and the combinations of capital that are a menace to liberty, solve these problems as best they can, without having erected by courts artificial barriers which render more difficult the struggle which at best is hard enough.

Do the acts in question deprive any citizens of their property without due process of law, in that they deny to some citizens the liberty of contract which they permit to others?

If the contracts sought to be prohibited by the statutes in question are hurtful to society, the right of the government to prohibit them cannot be questioned.

Stone vs. Mississippi, 101 U. S., 814.
Beer Co. vs. Massachusetts, 97 U. S., 25.
Thorpe vs. Rutland, 27 Vt., 149.
State vs. Wheeler, 25 Conn., 290.
Mayor vs. Miln, 11 Peters (U. S.), 139.
Cochran vs. Van Serlay, 20 Wend., 380.
Dorman vs. State, 34 Ala., 232.
Boston vs. Cummins, 16 Ga., 112.
Hamilton vs. St. Louis Co., 15 Mo., 23.
Wynehamer vs. People, 13 N. Y., 390.

Town of Guilford vs. Supervisors, 13 N. Y., 143.
Dibbrell vs. Morris Heirs, 15 S. W., 87, 90.
Sharpless vs. Mayor, 21 Pa. St., 147.
Bertholf vs. O'Reilly, 74 N. Y., 514.
Teidman's Lim. Pol. Powers, p. 5.
Cooley's Elements of Torts, p. 99.

The right of a citizen to make what contracts he pleases has been discussed many times by courts and text-writers. Mr. Cooley states the rule as follows:

"Every person sui juris has a right to make use of his liberty in any lawful employment in his own behalf, or to hire it out for the service of others. The State must always be at liberty to determine what are lawful employments, and to make others unlawful by prohibiting them. The authority to regulate business embraces every class and variety of occupation, and may be exercised either in respect to the persons who may be employed in the business, or as to the methods in which the business may be conducted." (Cooley's Elements of Torts, p. 99).

This language was used with reference to the powers of a Legislature. Mr. Teidman, in his excellent work on limitation of police powers, uses the following language:

"Where can these limitations be found (that is the limitation upon the exercise of police power), and in what do they consist? The Legislature is clearly the department of the government which can and does exercise the police power, and consequently in the limitations upon the legislative power, are to be found the limitations of the police power. . . . . Whenever an act of a Legislature contravenes a constitutional provision it is void, and it is the duty of the courts so to declare it, and refuse to enforce it. But is it in the power of the judiciary to declare an act of the Legislature void, because it violates some abstract rule of justice, when there is no constitutional prohibition? Several eminent judges have more or less strongly insisted upon the doctrine that the authority of the Legislature is absolute in those cases in which the Constitution fails to impose a restriction." Teidman's Lim. Pol. Powers, p. 5.

Continuing he said:

"But notwithstanding the opinions of these eminently respectable judges, the current of authority, as well as substantial constitutional reasoning, is decidedly opposed to the doctrine. It may now be considered as an established principle of American law that the courts, in the performance of their duty to confine the legislative department within the constitutional limit of its power, cannot nullify and avoid a law, simply because it conflicts with the judicial notions of natural right or morality, or abstract justice." Tiedman's Lim. Pol. Powers, page 7.

And of the right to enquire into the wisdom of these restraints and prohibitions the Court of Appeals of New York uses the following language:

"The question whether the act under consideration is a valid exercise of legislative power is to be determined solely by reference to constitutional

restraints and prohibitions. The legislative power has no other limitation. If an act can stand when brought to the test of the Constitution, the question of its validity is at an end, and neither the executive or judicial department of the government can refuse to recognize or enforce it. The theory that laws may be declared void when deemed to be opposed to natural justice and equity, although they do not violate any constitutional provision, has some support in the dicta of learned judges, but has not been approved, so far as we know, by any authoritative adjudication, and is repudiated by numerous authorities." 74 New York, 514.

Again: "Admitting, as we do, the soundness of this view, and fully approving it, we come back to the proposition that no law can be pronounced invalid, for the reason simply that it violates our notions of justice, is oppressive and unfair in its operation, or because, in the opinion of some or all of the citizens of the State, it is not justified by public necessity, or designed to promote the public welfare. We repeat, if it violates no constitutional provision, it is valid and must be obeyed. The remedy for unjust or unwise legislation, not obnoxious to constitutional objections, is to be found in a change by the people of their representatives, according to the methods provided by the Constitution." (Berthoff v. O'Rielly, 74 N. Y., 516.)

Particular attention is asked, also, to the able opinion of Judge Jeremiah S. Black found in the case of Sharpless vs. Mayor, 21 Pa. St., 147.

It will thus be seen that the liberty to contract is limited to lawful subjects. The Legislature has a right to prohibit any contract which it deems to be contrary to sound public policy, provided the exercise of the power of prohibition, in the language of the Supreme Court of Illinois. "be not unreasonable." Dealing in futures has been prohibited. Lotteries have been prohibited and the prohibitions sustained. Gambling contracts of all kinds are held void, because prohibited by law. Contracts in restraint of trade, the tendency of which is to destroy competition, Texas has a right to prohibit, because such contracts are injurious to society. They cannot be defended. The reasons for the existence of such laws have been most forcibly and clearly stated by this court speaking through Mr. Justice Peckham in the case of the United States vs. Trans-Missouri Freight Association, supra. His language will bear repetition here:

"Mere reduction in the price of the commodity dealt in might be early paid for by the ruin of such a class and the absorption of control over one commodity by an all-powerful combination of capital. In any great or extended change in the manner or method of doing business it seems to be an inevitable necessity that distress, and, perhaps, ruin, shall be its accompaniment, in regard to some of those who were engaged in the old methods * * * * * * when such changes are effected by combinations of capital whose purpose in combining is to control the production or manufacture of any particular article in the market, and by such control dictate the price at which the article shall be sold; the effect being to drive out of business all the small dealers in the commodity, and render the public subject to the decision of the combination as to what price shall be paid for the article. In this light it is not material that the price of an article may be lowered. It is in the power of

the combination to raise it, and the result in any event is unfortunate for the country, by depriving it of the services of a large number of small but independent dealers who were familiar with the business, and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein. Whether they be able to find other avenues to earn their livelihood is not so material, because it is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it might be, into a mere servant or agent for a corporation for selling the commodities which he once manufactured or dealt in; having no voice in shaping the business policy of the company, and bound to obey orders issued by others. Nor is it for the substantial interest of the country that any one commodity should be within the sole power and subject to the sole will of one powerful combination of capital. Congress has, so far as its jurisdiction extends, prohibited all contracts or combinations in the form of trusts entered into for the purpose of restraining trade and commerce."

But counsel for plaintiffs in error insist that the statutes prevent common partnerships, joint stock associations and private corporations. That contention is not even plausible. If it was the intention of these acts to prohibit the formation of partnerships, joint stock associations or corporations, why does the act of 1889 define a trust as a "combination of capital, skill or acts, by two or more persons, *firms, corporations or associations of persons,* or either two or more of them, for either any, or all of the following purposes?" What had to be done to form a trust by the combining of two or more persons, two or more firms or two or more corporations? Why prohibit the joining together of two or more corporations, if the corporations themselves are not permitted to exist? Why prohibit the joining together of two or more partnerships if a single partnership is not permitted to exist? Why not in terms prohibit the formation of corporations, partnerships, or joint stock associations? That ought to be a sufficient answer to their suggestion.

But the combination of two or more corporations, or two or more partnerships, or two or more associations is not prohibited for all purposes, but only for the purposes named in the statute. What are they: (1), to create or carry out restrictions in trade; (2), to limit or reduce the production or increase, or reduce the price of merchandise or commodities; (3), to prevent competition in the manufacture, making, transportation, sale or purchase of merchandise; (4), to fix at any standard figure whereby its price to the public shall be in any manner controlled or established, any article or commodity of merchandise, etc.; (5), to make or enter into or execute or carry out any contract, obligation or agreement of any kind or description in restraint of trade, etc. Condensing the pur-

poses for which the combinations must be made in order to come within the purview of the statute, they are for the purpose of fixing the selling price of an article at a standard figure, or to prevent competition. In other words, to create restrictions in trade. Partnerships are not primarily formed for the purpose of creating restrictions in trade. On the contrary, they are formed for the purpose of extending it. They are entered into not for the purpose of destroying competition or fixing any standard prices between competitors, but because their joint capital and combined skill may be necessary for the prosecution of the particular line of business.

Bates' Law of Partnership, Sec. 1.

Kent's Commentaries, 23.

Anderson's Law Dictionary, p. 749.

Bouvier defines a partnership as "An agreement between two or more persons for joining together their money, goods, labor, or skill, or either or all of them, *for the purpose of advancing fair trade*, and of dividing the profits or losses arising therefrom proportionally, or otherwise, between them." (Bouvier's Law Dictionary, title, Partnership.) It seems that there is a vast difference between "*advancing fair trade*," and *restricting fair trade*. The first being the object of the partnership, and the latter of the trust.

A corporation is but a different form of partnership. It is an artificial person created by the combination of several natural persons, whose obligations and responsibilities are defined by law. It is likewise organized for the purpose of prosecuting some business. This view is emphasized by the fact that the statutes in question recognize the legal existence of firms, corporations and associations of persons. They only seek to restrain illegal combinations of these corporations, partnerships or associations of persons, but not the creation of corporations, associations of persons or partnerships. It is clear that it never occurred to the Legislature that the existence of corporations, partnerships or business associations would be thereby prevented. If such had been the intention of the Legislature, it would have said so in plain and explicit terms.

The Supreme Court of Texas differs from learned counsel for plaintiffs in error on this question. That learned court, speaking through Associate Justice Denman, has said:

"In order to constitute a trust within the meaning of the statute, there must be a combination of capital, skill or acts by two or more. . . . If we

consider the purpose for which the combination must be formed to come within the statute, the essential meaning of the word 'combination,' and the fact that a punishment is prescribed for each day that the trust continues in existence, we are led to the conclusion that the union or association of 'capital, skill or acts' denounced, is where the parties in the particular case designed the united co-operation of such agencies, which might have been otherwise independent and competing, for the accomplishment of one or more of such purposes." (Meaning the purposes mentioned in the statute). (Gates v. Hooper, 39 S. W. Rep., 186; 90 Tex., 563).

This ought to be conclusive, on the well settled rule that a construction placed on a statute of a State by its own courts will be conclusive as to the legislative intent.

Combinations in restraint of trade have been prohibited for centuries. As has been stated, "The rule that contracts in restraint of trade shall be void as against public policy is among our most ancient inheritances; as early as the second year of Henry V., A. D. 1415, we find by the Year Book that this was considered to be an old and settled law." (Spelling on Trusts and Monopolies, Sec. 4.) Yet, during all of this period, partnerships were legal.

The Federal Congress passed an act on January 2nd, 1890, to the effect that "every contract, combination in the form of a trust *or otherwise* or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal." This court has held that that act applied to all contracts entered into for the purposes named, and yet I presume that it never entered the mind of this court that Federal corporations, like the Texas Pacific Railway Company, and others, should be dissolved, or that partnerships doing an exclusive interstate business, not organized for the purpose or restraining trade, but rather to extend it, should be from that date unlawful. Yet to follow the argument of learned counsel for plaintiffs in error that must be the result. But the formation of corporations or joint associations or partnerships does not necessarily result in the destruction of competition, or in the restraint of trade. Counsel for plaintiffs in error may insist that the motives of a partnership cannot always be ascertained except by results. They may invoke the old legal maxim that every person is presumed to intend the reasonable and probable results of his own action. They may insist that the reasonable and probable result of a partnership, firm or corporation is to create restrictions in trade and destroy competition, and therefore that persons, firms, corporations or associations of persons must be presumed

to have been formed for that purpose. The logic is absurd. We deny that the reasonable or probable result of forming a partnership or a corporation is to create restrictions in trade or destroy competition, or do any acts prohibited by the statutes in question. For example, take any city or town in the United States in which one dozen firms are doing business. Does it make competition any less because these dozen mercantile establishments are conducted by firms or corporations, rather than by single individuals? Are there not twelve competing factors in each of these towns or cities, as the case may be, and whether the entities that make these factors are artificial persons or whether they are partnerships, is not the competition the same? To illustrate further, suppose that the town has twelve business partnerships in it. Would it increase the competition for one person to retire from each of these twelve firms? Would it facilitate the trade? It seems not. Put it another way: Suppose twelve men are engaged in the mercantile business in a town, each in competition with the other, and conducting an establishment of his own. Suppose each of these takes unto himself a partner, which makes the number that is engaged in the mercantile business in that town twenty-four. Has the trade been restricted? Has competition been destroyed or even lessened thereby? It is granted that it is possible to create a partial restriction in trade by the formation of a partnership, but the restriction would be temporary only. Competition would come again. But no man is presumed to intend the *possible* results of his own action. If partnerships and corporations were destroyed, it might result in destroying competition to a greater extent than their existence could possibly do. To illustrate, suppose A. and B. desire to enter into a mercantile business in competition with a firm already in existence. Neither A. nor B. have sufficient capital to conduct the business. But by combining their capital they could make it successful. If they are prevented from forming the partnership, the competition will not exist. If they are permitted to form a partnership, competition will be created. It is plain, therefore, that if they are prohibited from forming partnerships no competition can be had. It is equally plain that instead of partnerships and corporations creating restrictions in trade, they are absolutely necessary in some instances to create competition in trade. Suppose that it be sought to build a railroad through Texas which would be parallel and in com-

petition with a line already in existence. No single individual can build that road. If a corporation can not be organized competition becomes impossible. It must follow, therefore, that the major premise of the counsel for plaintiff in error, to the effect that the formation of partnerships and corporations creates restrictions in trade is erroneous. Therefore, the conclusion deduced therefrom to the effect that the statute was designed to prevent the ordinary business association is erroneous.

It is always possible to create temporary restrictions in trade by the formation of partnerships or corporations. It is possible for two merchants living in the same town to form a partnership, and in that way destroy competition between themselves. But if there is room for two establishments, if the trade will justify competition, it will enter, and the result will be beneficial rather than hurtful to society in that it will give the particular village or town sufficient capital and skill to carry on the trade. Perhaps neither of these two merchants left by himself would be able to conduct the business of the character which the needs of the particular community would demand. If it be conceded that the possible results of the partnership or corporation be to create restrictions in trade, still it will not follow that the people forming the partnership must have intended such a result. The rule when most strictly applied is that people are only presumed to attend the reasonable and probable result of their own action, but they are not always held responsible for the possible results of their own action. Take the New York Central Railroad for illustration. It was built for the purpose of transporting freight and passengers. It was a necessary aid to commerce. It was well known, however, that accidents were possible, and that the operation of the railroad would possibly result in the loss of human life. It could not be said however, that because that was one of the possible results that the corporation was created for that purpose. Take a banking corporation as another illustration. It is formed for the purpose of legitimate gain. All of the stockholders expect to increase the amount of their worldly goods by its successful management. But conditions become such that the business is conducted at a loss, as it frequently is. That is always possible. Must it be stated that the stockholders entered into this corporation for the purpose of losing their money because such a result was possible? Surely such a contention approaches the absurd.

yet it is the contention of learned counsel for plaintiff in error in this case.

But in addition to the foregoing the rule should be remembered that all acts of the legislature must be construed together, and particularly those passed at the same session. The same legislature which passed the act of 1889 passed another act admitting insurance companies into Texas for the purpose of doing business. The act was approved April 3, 1889. It will be noted that the anti-trust act was approved March 30, 1889, only three days before. The act admitting the insurance corporations, so far as applicable, reads as follows:

"That companies or associations organized under the laws of any other State of the United States, carrying on the business of life or casualty insurance on the assessment or natural premium plan, and having cash assets of a sum not less than one hundred thousand dollars, invested as required by the laws of this State regulating other insurance companies, shall be licensed . . . to do business in this State," etc. (See Acts of Texas Legislature of 1889, p. 98).

On the 19th day of March of the same year the same body passed a law authorizing corporations and partnerships to be formed for the purpose of irrigation. So far as applicable it reads as follows:

"When any person, corporation, or association of persons, by compliance with the preceding provisions of this act, shall become entitled to the use of the waters in any river or stream, it shall thereafter be unlawful for any other person, corporation or association of persons, except for domestic use by anyone entitled thereto, to so divert the flow of water in said river . . . ." etc.

Section 10 of the same act reads as follows:

"Corporations may be formed and chartered under the provisions of this act and of the general incorporation laws of the State of Texas, for the purpose of constructing, maintaining and operating canals, ditches, flumes, ..." etc.

The Texas Legislature recognized the legal existence of corporations both before and after the passage of these acts. Their right to exist has never been challenged, but it is only their combinations for the purpose of restraining trade or destroying competition that is prevented. That is all. They stand on the same basis so far as this act is concerned as natural persons do. No one supposes in Texas that the acts prohibit partnerships, and, indeed, no fair construction would justify such a conclusion. This question seems to have been settled by this court in the recent unpublished decision in the case of the United States vs. The Joint Traffic Association.

Do the acts in question undertake to prohibit foreign corporations from doing an interstate business with the citizens of Texas?

There ought to be no contention on that question. The Supreme Court of Texas have settled that question against the position of plaintiffs in error. The Supreme Court in the case of Fuqua vs. Pabst Brewing Co., 38 S. W. Rep., 30, in discussing the contract made the basis of the suit in that case said:

"The parties contracted for the sale and purchase of beer to be transported from Milwaukee, Wis., to Amarillo, Texas, to be there delivered to Kingsbury and become his property. So far the transaction was interstate commerce and not subject to State regulation without the consent of Congress, *nor did the statute* (meaning the statute in question) *undertake in any way to regulate or prohibit same.* But the parties by the same contract voluntarily went further and so dealt with the subject after it had ceased to be an article of interstate commerce as to create a trust as above shown, in violation of the statute."

The Supreme Court having determined what the statute meant, I presume their construction will be accepted by this court. Besides that, the language of the act itself does not justify the contention of counsel for plaintiffs in error. There is a marked difference between a corporation doing business within the State, and one doing an interstate business with its citizens. This court has many times determined that each State has a right to dictate the terms upon which foreign corporations do business within its limits. (Pembina Mfg. Co. vs. Pennsylvania, 125 U. S., 183, and other authorities herein previously cited.) But the Supreme Court throughout its decisions heretofore and since made have recognized what everybody else recognizes, that the States have no right to prevent interstate commerce. What the statute was attempting to do was to prevent their doing business within this State. The reasonable construction ought to be placed on it, and not an unreasonable one. Therefore the judgment of the trial court in giving to the statute the same construction that the Supreme Court had given it, to the effect that the decree of injunction rendered in this case should in no sense interfere with the interstate business of a corporation, was entirely right, so as to relieve the officers whose duty it was to execute the decree without any misapprehension of its terms. Whether he had put that proviso in it or not would not have affected the decisions.

The statutes of 1889 and 1895 do not undertake to prohibit the commission of any act done in any State other than Texas, and

therefore, the argument of the plaintiffs in error on that point is gratuitous. The section of the statute which they insist violates the Constitution in this respect reads as follows:

"Persons out of the State may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this act which do not in their commission, necessarily require a personal presence in this State, the object being to reach and punish all persons offending against its provisions, whether within or without the State."

It will be observed that it only makes liable persons without the State for the commission of an act which does not necessarily require the personal presence in the State. There are many such acts and in asserting this doctrine they were not travelling unbeaten paths. It is well settled that a man may commit a crime in another State without ever going within its borders. For instance: a Texas merchant may write a letter to a New York merchant and obtain goods delivered to him on board the cars in New York. The Texas merchant receives them through his agent and transports them to his home. These goods may be obtained upon false representations sufficient to violate the criminal statutes of New York and yet, the Texas merchant may never have been within the limits of New York State. A Texas banker can defraud a New York banker by similar methods, and yet the Texan may never have reached New York. He is guilty of a criminal act, however, and may be punished therefor if ever caught within the limits of New York State.

The conspiracy may be formed to steal live stock in Texas—cattle and horses. In the consummation of the unlawful purpose it may be necessary to have several parties employed, all with guilty knowledge. Some of these parties may be located out of the State for the purpose of disposing of this stolen property, but knowing that it is being stolen. Certainly he would be violating the criminal laws, although he was out of Texas, while the crime was being actually committed in Texas, but he knew of its commission, aided in its commission and performed his part. The same may be said of all other crimes. The question usually arising upon that state of facts would be whether or not the parties committing crime were acting together in its commission in Texas, though the personal presence of all of them would not be required. To make people guilty of criminal acts, they need not be in the exact spot where the crime is committed. The distance between them and the place where the crime is actually committed is not even a factor, provided

he knows the crime is being committed and acquiesces and aids therein.

This reasoning would apply with equal force to the crimes of forgery, swindling, counterfeiting and the circulation of forged instruments and counterfeit money.

These questions have been considered many times and particularly in that class of cases in which requisitions have been refused on the ground that the criminal had fled from the State, he never having been within its limits.

Ex Parte Reggel, 114 U. S., 642.

Criminal Law Mag., Vol. 3, p. 804.

Am. & Eng. Ency. of Law (old edition), Vol. 7, pp. 645 and 646 and authorities cited.

Moore on Extradition, Vol. 2, Secs. 578 and 587.

Counsel for plaintiff in error fail to discriminate between acts done *within* Texas by persons out of the State and acts done beyond her limits. But this question becomes immaterial because Section 9 can be eliminated from the statute and yet it be held valid. The construction on that question does not affect the acts shown by the record to have been committed in this case and upon which the judgment of the court was based.

The necessity for the statute is apparent in this case. Here is a Missouri corporation engaged in the sale of oils. It made agreements with its Texas customers to the effect that they should purchase from this company only. On this point I may be permitted to quote from the record:

F. Q. Rast testified that he lives in Cleburne, Texas; that he purchased oil from the Waters-Pierce Oil Company; that he received rebates from the Waters-Pierce Oil Company from the regular price of oil purchased from them (Record, p. 101). That they offered him oil if he would agree to handle the company's product exclusively at three cents per gallon less than he was paying for the oils he was then handling; that he made such contract with them; the understanding was that in order to have the benefit of the rebates of three cents per gallon he was to handle exclusively the Waters-Pierce Oil Company's oils. (Record, p. 102.)

D. F. Hare said he did business in Belton, Texas; said I have received from the Waters-Pierce Oil Company rebates from the

regular price of oil purchased from them when I dealt in oil. It was in the fall of 1894 or the spring of 1895. The consideration upon which I received this rebate was that I should handle only their oils and that would enable me to sell their oils cheaper than others could be sold. (Record, p. 103.)

G. F. Ware testified: I never got any rebate from the Waters-Pierce Oil Company, though I was promised by their agent, J. S. Monroe, at Brownwood, that if I would abstain from handling other oils he would always give me as low price on oils as competitors, if not more so, if I would handle his oil exclusively. (Record, p. 100.) Again, the same witness said: The Waters-Pierce Oil Company and their agent refused to sell me oil because I bought oil from the Cleveland Refining Company and Geo. Rice in Brownwood. (Record, p. 100.)

K. E. Dunning testified that he was a merchant. Said he: The Waters-Pierce Oil Company's agents have refused to sell me oil because I was handling other oil. It was in October, 1895, in the town of Brownwood, Texas. The agent said he was instructed by his company not to sell parties oil who were handling other oil. The Waters-Pierce Oil Company refused to sell me oil because I was handling other oils. (Record, p. 99.)

W. C. Dugger testified that S. L. Pegues, his father-in-law, was the agent of the Waters-Pierce Oil Company, but that he, Dugger, attended to his business; that in pursuance of instructions from the company he went around town in San Marcos, Hays county, and made contracts with about all but three merchants in the town and made contracts to sell them oil at stipulated prices. The number of contracts I made was with about ten or fifteen merchants. They were to get their oil at ten cents a gallon and retail it at fifteen cents. (Record, p. 84.)

A. H. Yarrington testified: I lived at Fairview Park in the city of Austin in 1890. I was engaged in the business of general merchandise and handling illuminating oils. I have had dealings with the Waters-Pierce Oil Company. In 1890 I bought some oil from an Ohio company; do not know their name without looking on the books; after that I made an effort to buy oil from the Waters-Pierce Oil Company, and the agent refused to let me have it unless I would sign an agreement not to buy oils from outside concerns. (Record, pp. 104 and 105.)

T. J. Lovelace testified that he resided in Waco, McLennan county, Texas; that after he had laid in a stock of oil from another concern the Waters-Pierce Oil Company ran the retail price down in Waco lower than he could buy it at wholesale, and that by thus running the retail price of the Waters-Pierce oil down below what I could buy other oil at I was compelled to quit selling oil at all because I could not afford to sell it at less than what I had to pay for it. I could not buy the Waters-Pierce Oil Company's oil at the cut rates because I bought oil from another company. In fact they refused to sell it at any price unless I agreed to buy from no one else but them. (Record, p. 108.)

It was also in evidence that at numerous places in Texas the Waters-Pierce Oil Company had distributing points at which they had large reservoirs into which oil would be pumped from oil cars and that from these reservoirs the orders of the merchants of Texas would be filled. It was stated that cans of oil were shipped to Texas and perhaps sold by the can or in unbroken packages. (Record, p. 88, 90, 97.)

Numerous witnesses testified to the fact that the Waters-Pierce Oil Company in dealing with them made contracts fixing the price at which they should sell their products. See the testimony of H. Schmidt, R. p. 117; W. F. Hanning, R. p. 116; J. W. Thomason, R. p. 118; Herman Voss, R. pp. 118 and 119; W. A. Bryan, R. pp. 115 and 116.

It was upon this testimony and the testimony of many other witnesses that the verdict of the jury and the judgment of the court was based.

But suppose that the Waters-Pierce Oil Company had not had any place of business in Texas; suppose that they were outside of the State, and yet, would ship oil into Texas in any quantity wanted, not in unbroken packages only, but otherwise, and thus contract with the people of Texas that they must sell their oil at retail in broken packages at a price fixed by the Waters-Pierce Oil Company, would they not be guilty of an offense against the State? Suppose a wholesale merchant in St. Louis, Chicago or New York, undertakes to furnish a Texas merchant with clothing and in doing so makes a contract with the clothing merchant in Texas that after he shall have bought the clothing he must sell it to his customers at a given price, is not the foreign merchant guilty of violating the laws

of Texas? Not by the interstate transaction which ended with the selling and delivery of the goods in Texas, but by reason of the execution of the other contract, that is the price at which the Texas merchant shall sell the goods so purchased to his customers, the citizens of Texas. There is a crime committed without his personal presence. We could not have extradited him under the authorities heretofore cited, because he had never been in Texas and therefore could not be said to have fled from Texas. But under the same authorities if the merchant should ever visit Texas he could be held and ought to be held for the violation of her statutes. But, as before stated, this is not material in this case, because that section of the statute can be eliminated altogether and yet the facts upon which this case was based will support the conviction. It is not an interstate transaction at all. The judge of the court fairly submitted the facts to the jury. The jury found against the plaintiffs in error upon those issues and that finding is conclusive.

M. K. & T. Ry. vs. Haber, 18 Sup. Ct. Rep., 489.

The decisions of the Texas courts upon matters of procedure are recognized as final.

Egan vs. Hart, 165 U. S., 188.

Oxley Stave Co. vs. Butler Co., 166 U. S., 648.

Therefore, there is nothing in the other suggestion that the court should have charged upon reasonable doubt, because that is essentially a question of procedure. But the court of Civil Appeals say that the question as to whether the reasonable doubt should be charged was not properly raised in the court below. (Record, bottom page 179.) The assignments of error did not raise this question and hence, we submit that it cannot be made available for the first time in this court, but even if raised, the Texas courts have settled it as charged by the trial court.

Pace vs. Mortgage Co., 43 S. W., 36.

In this connection we beg to call attention to the learned opinion of the Court of Civil Appeals for a full, able and elaborate discussion of the question involved. (Record, pp. 161 to 179, inclusive.)

It is unnecessary to further advert to the fact that the trial court withdrew from the consideration of the jury the question of the Standard Oil conspiracy and its operation in Texas, for the reason

that the judgment in this case rests on other and distinct agreements made and executed in Texas, which have been heretofore pointed out. In excluding from the consideration of the jury the Standard Oil conspiracy, the trial court erred. The record contains proof most positive of the pernicious effects of the operation of trusts. The Standard Oil agreement was made by a number of wealthy corporations and partnerships. The plaintiff in error in this case claimed that the combination was dissolved, but the claim is unfounded; because the record discloses that the Waters-Pierce Oil Company alone of all the number of corporations and partnerships engaged in the Standard Oil conspiracy sells illuminating oils in Texas, Southern Missouri, Arkansas, Indian Territory, Oklahoma Territory, Louisiana, west of the Mississippi, and Old Mexico; and that the Waters-Pierce Oil Company does not sell illuminating oils in any other portion of the Union. This is not proven by doubtful testimony, but was admitted on the trial of this case by the plaintiff in error. (Record, p. 72.) Is not this a most singular fact? Remembering the depot of supplies of the Waters-Pierce Oil Company is in East St. Louis, general offices are in St. Louis, and it is a Missouri corporation, yet it sells no illuminating oils in all of the vast rich Northwest—Illinois, Ohio, Iowa, Indiana, Nebraska, and other States, nor does it invade the eastern portion of the Union, nor any portion of the South except the territory above named. The Southwest is allotted to it as its peculiar territory in which none of the companies entering into the Standard Oil agreement compete with it. It is absurd to say that this division of territory was the result of accident—it must have been the result of an agreement. Other companies have come into Texas and attempted to compete with the Waters-Pierce Oil Company, but none of these rich concerns entering into the Standard Oil agreement have dared to do so.

As before stated, it is not necessary in the discussion of this case to consider this question except to emphasize the necessity of the statutes in question prohibiting *dealers* from forming trusts and combinations in one State and executing them in another. The Texas statutes ought to be upheld in so far as they tend to prevent such transactions, unless this court is clearly convinced that they are void. All doubts, from the very nature of the case, should be resolved in favor of the people thus struggling to protect them-

selves against these vast combinations which seek to control the prices of the prime necessities of life. The mere fact that the Texas statutes exempt from their operation that character of agreements which could not hurt her people, which could not create monopolies, which could not destroy competition nor fix the standard of prices, ought not to render the statutes invalid. Because it was not to prohibit the harmless agreements that the statutes were passed, but it was to prohibit those that were sapping the very foundations of commerce, destroying competition and fixing a standard of prices—not by the laws of supply and demand, but by the arbitrary agreements of those who control the output of the refineries and of the petroleum fields.

It may be possible that the act in question prohibits some classes of contracts that are not necessarily injurious to society. But it may be that the Legislature found it impossible to exclude from the terms of the legislation in question these contracts. The Legislature cannot always discriminate so closely and nicely. In other words, in prohibiting the evil, some innocent acts may be likewise prohibited, because the innocent acts cannot well be separated from those that are evil. But that does not justify the contention here made by plaintiffs in error, that in order to prohibit the evil they must necessarily prohibit all that is not evil. As before stated, many innocent acts may necessarily be prohibited because incapable of separation from those that are evil. That is to say, incapable of such an exact definition as to render the administration of the law possible. Yet it ought not to be held that innocent acts that are easily separable from the evil or vicious acts should be prohibited in order to make the prohibition of the injurious acts valid. The gaming laws of the several States prohibit many games that are not *malum in se*. They are merely *malum prohibitum*. But to permit those games would open the door to fraud and render it impossible, or at least most difficult, to prohibit those that are evil. But no one ought to be heard to say that all innocent games should be prohibited in order to make the statutes valid.

It is no answer to the suggestion, either, that in preventing these combinations some others may be prevented which are not necessarily harmful. It is not easy for the Legislature, as before suggested,

to exclude from the operation of her statutes every agreement which may or may not be hurtful, because human legislation must be necessarily imperfect in its details. The statutes are clearly within the power of the Legislature to pass, and it is therefore respectfully submitted that they ought to be upheld and the case affirmed.

M. M. CRANE, Attorney-General, and T. A. Fuller assistant
Attorneys for the State of Texas, Defendant in Error.

Supreme Court of the United States

OCTOBER TERM, 1909.

No. 37

WATERS-PIERCE OIL COMPANY, Plaintiff in Error,

vs.

THE STATE OF TEXAS, Defendant in Error.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

ARGUMENT FOR DEFENDANT IN ERROR.

T. S. Smith,
Attorney General of Texas,
Counsel for Defendant in Error.

Judd & Detweiler, Printers, Washington, D. C. 1-8-1910

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 97.

WATERS-PIERCE OIL COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

I propose to attempt to answer the argument of counsel filed October 10, 1899, which was since the filing of the able and exhaustive brief filed herein for defendant in error by my predecessor, and I shall briefly refer to some of the assignments of error copied in the brief filed herein October 8, 1898.

The three objections urged to the acts of March 30, 1889, and of April 30, 1895, of the State of Texas are as follows:

I. Make penal all associations of two or more persons for business purposes.

II. Render it impossible for two or more persons associated to carry on business; and

III. That the right of persons to associate and carry on business is one of the liberties protected by the fourteenth amendment to the Federal Constitution.

I shall treat the first two objections together. It occurs to me that the position is untenable that either act prevents the voluntary association of two or more persons to form partnerships or corporations to deal in commodities and merchandise, and to transact any business—commercial, banking, railroading, or otherwise—the object and effect of which is no innovation in business transactions, and which does not pretend and propose to *create* and *carry out* restrictions in the full and free pursuit of any business authorized or permitted by law.

Nowhere in either act is any association or combination inhibited except for specified purposes, each purpose clearly stated and connected with and denounced by the act as unlawful, because either it is a monopoly or a restriction in free and full pursuit of lawful business and impairs the open market, or an agreement to carry out contracts interfering with open competition and unrestricted competition among themselves and others, and to prevent the formation of any such contracts. Nowhere is it pretended to "prevent the association of two or more persons for business purposes"—lawful business purposes, honest business purposes. On the contrary, the legislature of Texas, during the same session that it passed the act of April 30, 1895, passed an act amending the law authorizing the association of persons into private corporations, and named over fifty different purposes for

which private corporations may be formed; and in 1897 the legislature of Texas again amended the incorporation act and enlarged and increased the number of the purposes for which private corporations could be formed.

And it is part of the history of the country that hundreds of private corporations organized under the laws of the State of Texas, and as many more organized under the laws of the various States of the Union, are daily doing business in Texas under and subject to her laws, and fostered and protected by the State, her laws, and her courts. It is only the modern trust that the acts of 1889 and 1895 are attempting to declare unlawful and to prevent doing business in Texas. I believe the State of Maine was the first State in the Union which passed an anti-trust law, and Texas followed, either the second or third, with the act of 1889. And the decision of our own supreme court in the case of Queen Insurance Co. *vs.* Texas, 86 Texas, 250, wherein the court declared that by the terms of the act of 1889 insurance was not included in any of the terms of said act, and that it was not trade or commerce, but was an aid to commerce, was to a large degree the necessity for the act of 1895, and in subdivision 1 of section 1 thereof will be found the term "restrictions in trade or commerce or aids to commerce, or to create or carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this State."

Again recurring to the laws of Texas to answer the first two objections quoted from counsel's written argument. The Revised Statutes of 1879 and of 1895 of the State of Texas contain provisions authorizing the formation of partnerships and limited partnerships and

provide for the protection of the members of the same, and make ample provision for the limiting and protecting the liability of a partner in a limited partnership who contributes a specified sum to the concern, and never have the laws of Texas attempted to embarrass the investment of capital or the pursuit of any business by individual associations, partnerships, or corporations unless the object, intent, and purpose was to restrain trade or commerce or in some way to create and carry out restrictions in the full and free pursuit of business authorized and permitted by the laws of our State and country.

This court has not been cited to any case in Texas where under either act of the legislature any association of two or more persons for business purposes has been restrained, made penal, or even interfered with. No argument is made that plaintiff in error was engaged in fair and legitimate business. The record shows the character of business it was carrying on.

Where any competition arose to the plaintiff in error it decreased the price of oil there; would not sell to any dealer who bought oil from any other person, and it fixed the price at which dealers must sell, and restricted and controlled arbitrarily the price of oil in the State of Texas.

To show the character of business which the law, in my judgment, intended to prohibit and which it should prohibit, I trust I will be pardoned for repeating some of the testimony as shown by the record, to show, if necessary, the character of business transacted by plaintiff in error in Texas under its permit granted by the State. Witness Rast testified that he purchased oil from Waters-Pierce Oil Company; that he received rebates from

Waters-Pierce Oil Company from regular price of oil purchased from them (Record, p. 101); that they offered him oil, if he would agree to handle the company's product exclusively, at three cents per gallon less than he was paying for the oils he was handling; that he made such a contract with them; the agreement was, that in order to have the benefit of the rebates of three cents per gallon he was to handle exclusively the Waters-Pierce Oil Company's oil (Record, p. 102).

Witness D. F. HAIR lived in Belton, Texas. He had received from the Waters-Pierce Oil Company rebates from the regular price of oil purchased from them. It was in the fall of 1894 or spring of 1895. The consideration upon which I received this rebate was that I should handle only their oils, and that would enable me to sell their oils cheaper than others could be sold (Record, p. 103).

G. F. WARE testified:

I never got any rebate from Waters-Pierce Oil Company, though I was promised by their agent, J. S. Monroe, at Brownwood, Texas, that if I would abstain from handling other oils they would always give me as low price on oils as other competitors, if not more so, if I would handle his oil exclusively. The Waters-Pierce Oil Company and their agent refused to sell me oil because I bought oil from the Cleveland Refining Company and George Rice, in Brownwood, Texas (Record, p. 100).

K. E. DUNNING testified:

The Waters-Pierce Oil Company's agents refused to sell me oil because I was handling other oil. It was in October, 1895, in town of Brownwood, Texas. The agent said he

was instructed by his company not to sell parties oil who were handling other oil.

The Waters-Pierce Oil Company refused to sell me oil because I was handling other oils (Record, p. 99).

W. C. DUGGER testified that his father-in-law, S. L. Pegues, was the agent of the Waters-Pierce Oil Company, but that he, Dugger, attended to his business; that in pursuance to instructions from the Waters-Pierce Oil Company, he went around town in San Morcos, Hays county, Texas, and made contracts with about all but three merchants in the town, and made contracts to sell them oil at stipulated prices. The number of such contracts made was with ten or fifteen merchants. They were to get oil at ten cents a gallon and retail it at fifteen cents a gallon (Record, p. 82).

A. H. YARRINGTON testified:

Lived at Fairview Park, in the city of Austin, Texas, in 1890; was engaged in general merchandise business and handling illuminating oils. I have had dealings with Waters-Pierce Oil Company. In 1890 I bought some oil from an Ohio company; do not remember their name without looking on my books. After that I made an effort to buy oil from the Waters-Pierce Oil Company, and the agent refused to let me have it unless I would sign an agreement not to buy oils from outside concerns (Record, pp. 104 and 105).

T. J. LOVELACE testified that he resided in Waco, McLennan county, Texas. In 1892 I bought oil shipped here by George Rice, and the Waters-Pierce Oil Company refused to sell me oil at any price. The Waters-Pierce Oil Com-

pany did interfere with my sale of other oils, and their interference consisted in this: I had bought Rice's oil, and Waters-Pierce Oil Company cut the price and sold at retail at less than I had bought wholesale; and after said Waters-Pierce Oil Company had reduced the price in this way they refused to sell me at the reduced price. By running the oil at retail below what I paid at wholesale, I was forced to quit selling oil at all (Record, p. 108).

J. A. CROOKS: Resides at Waco, McLennan county, Texas. I handled George Rice's oil, and the result was that I had to quit business. I couldn't compete with the cut prices inaugurated by Waters-Pierce Oil Company whenever I bought Rice's oil and placed it on the market (Record, p. 109).

This witness details how his customers were driven from him, and how he was forced out of competition with Waters-Pierce Oil Company (Record, p. 109).

The testimony of a number of other witnesses in different parts of the State is to same effect, but I will not prolong the quotations.

Thus it is shown that the plaintiff in error was not prohibited by either act complained of from carrying on a legitimate business in Texas.

Chief Justice Fuller, delivering the opinion for the Supreme Court in the Sugar Trust case (156 U. S., p. 16), said:

"All the authorities agree that in order to vitiate a contract or combination, it is not essential that it should be a complete monopoly; it is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition."

This was sufficient ground for the State to cancel the permit to do business in the State.

The third objection and criticism against the statutes, "That the right of persons to associate and carry on business is one of the liberties protected by the fourteenth amendment to the Federal Constitution," I cannot agree with as even a correct abstract proposition of law.

The fourteenth amendment provides that—

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The meaning of these privileges and immunities has been defined by the courts as those rights which are fundamental under any free government, including the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, *subject to such restraints as Government may prescribe for the general good of the whole.* All trusts and monopolies in any trade or merchandise or commodity are an invasion of these privileges, for they encroach upon the liberty of the citizen to acquire property and pursue happiness, and to barter and purchase in an open market.

It is true, plaintiff in error is a corporation organized under the laws of the State of Missouri, and is therefore, I admit, a citizen of the United States. But no corporation organized under the laws of one State can do business in another State (barring interstate commerce) without the consent of the State within which it proposes to do business.

Pembina Mining Co. *vs.* Penn, 125 U. S., 183.

No State can have power to create a monopoly in any industry by incorporating a number of men into one body without doing violence to the Constitution of our country; and what it cannot do directly it cannot do by indirection. The incorporation of any body of men with monopolistic power is in contravention of the spirit and form of our Government and its written Constitution; and when organized trusts and combines are possessed of such monopolistic powers and tendencies, and exert them, as was shown that the Waters-Pierce Old Company did exert in the State of Texas, then they should be abolished or prohibited from doing business in the State. I deem it just to refer to the judgment of the district court in this case to show that only the right to do business in Texas was enjoined, and that its interstate-commerce business was not attempted to be prohibited.

The specifications of error may be stated to include two general errors: One, that the court of civil appeals of Texas erred in not finding the two acts of the legislature were in violation of the fourteenth amendment to the Constitution of the United States, and the other that the court erred in holding with the trial court that the controversy was of a civil nature and in refusing to hold it of a criminal nature, and should therefore have instructed the jury—

"That if upon all the evidence the jury should entertain a reasonable doubt of the guilty participancy of plaintiff in error in any unlawful acts of its agents, then the jury would find for the plaintiff in error, the case being one essentially criminal in all its features and not a controversy of a civil nature."

Answering the first objection, I submit that—

This law deals alike with all of a certain class, and is not obnoxious to the charge of a denial of equal protection before the law.

This proposition of law, I believe, can be fairly applied to both the acts of 1889 and 1895, and, if so, the law will be sustained as not being hostile to the protective clauses of the fourteenth amendment of the United States Constitution.

Hayes *vs.* Missouri, 120 U. S., 68.
Railroad Co. *vs.* Mackey, 127 U. S., 205.
Walston *vs* Nevin, 128 U. S., 578.
Bell's Gap R. R. *vs.* Pennsylvania, 134 U. S., 232.
Pacific Express Co. *vs.* Seibert, 142 U. S., 339.
Giozza *vs.* Tiernan, 148 U. S., 657.
Columbia So. R'y *vs.* Wright, 151 U. S., 470.
Marchant *vs.* Penn. R. R., 153 U. S., 380.
St. Louis and San Francisco R'y Co. *vs.* Mathews, 165 U. S., 1.

I submit that the exemptions in Texas statutes under consideration are neither arbitrary nor unreasonable, but rest upon a basis which has a reasonable and just relation to the subject-matter to which the classification is proposed.

In the case of Gulf, Colorado and Santa Fe R'y Co. *vs.* Ellis, 165 U. S., on page 163, in the opinion of the majority of court Mr. Justice Brewer, after reviewing a line of decisions of the State courts on statutes allowing attorneys' fees to one of litigants against corporations, mostly railway corporations, cites an Arkansas case and uses the following language:

"It is worthy of note that in the same volume is found a decision by the same court sustaining a statute allowing an attorney's fee in actions for the recovery of overcharges by railroads (Dow *vs.* Beidelman, 49 Ark., p. 455); but the statute had prescribed the rates of charge for the carriage of passengers by railroads, had forbidden an overcharge, and it was as a penalty for failure to comply with such police regulations that the allowance of an attorney's fee was sustained."

In the case of Missouri *vs.* Lewis, 101 U S., 22, 31, Mr. Justice Bradley said:

"We might go still further and say, with undoubted truth, that there is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York city and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the fourteenth amendment, be a denial to any person of the equal protection of the laws. * * * The fourteenth amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies."

And in the case of Commonwealth *vs.* Alger (7 Cush., 53, 84), Chief Justice Shaw said:

"We think it a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that its use may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community."

On the complaint and assignment of error that the said statutes violate the Constitution of the United States, because they in their natural operation and effect deprive many citizens and persons of their property without due process of law, I respectfully cite the case of Holden *vs.* Hardy, 169 U. S., 380, and the opinion of Mr. Justice Brown in said case, as, in my judgment, a complete answer and refutation of this assignment, and as also very strong authority answering the other errors complained of.

NOT A CRIMINAL CASE.

An information in the nature of a *quo warranto* is essentially a civil suit brought in the name of the State to oust one who holds an office in violation of law or a corporation exercising franchises which it has forfeited, and as to all matters of pleading, evidence, process, and practice it is governed by the same rules applicable to all other civil causes.

AUTHORITIES.

2 Spelling Ex. Relief, sec. 1846.
Beach on Monopolies and Trusts, sec. 222.
State of Texas *vs.* De Gress, 53 Texas, 387.
City of East Dallas *vs.* The State, 73 Tex., 374.

I respectfully refer this court to the opinion of our court of civil appeals (Record, pp. 167 to 180), and also submit that this judgment should be affirmed.

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Attorney General of Texas,
Counsel for Defendant in Error.